TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 248 27

AMERICAN SCHOOL OF MAGNETIC HEALING AND J. H. KELLY, APPELLANTS

vs.

J. M. McANNULTY

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED AUGUST 28, 1906.

(17,887.)

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J. M. McANNULTY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1901.

COPY BOUND CLOSE IN CENTER

a UNITED STATES OF AMERICA, *sct:*

To J. M. McAnnulty, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein American School of Magnetic Healing and J. H. Kelly are complainants and J. M. McAnnulty *are* respondents, to show cause, if any there be, why the judgment rendered against the said complainant in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of August, in the year of our Lord one thousand nine hundred.

WILLIAM C. HOOK, *Judge.*

[Endorsed:] United States circuit court, western district of Missouri, western division. American School of Magnetic Healing & J. H. Kelly *vs.* J. M. McAnnulty. Citation. Filed Aug. 3, 1900. Adelaide Utter, clerk.

b UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I hereby acknowledge due service of the within citation this 3rd day of August, A. D. 1900.

WM. WARNER,
Attorney for Respondent.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on the 30th day of May, A. D. 1900, there was filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri a bill of complaint, wherein American School of Magnetic Healing, S. A. Weltmer, and J. H. Kelly are complainants and J. M. McAnnulty is defendant.

Thereupon a writ of subpœna was duly issued in said cause; which writ and the marshal's return thereon is in words and figures as follows:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

The President of the United States of America to J. M. McAnnulty, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri, on the first

Monday of July next, at the city of Kansas City, then and there to answer the bill of complaint of American School of Magnetic Healing, S. A. Weltmer, & J. H. Kelly, citizens of the State of Missouri, filed against you on the 30 day of May, A. D. 1900. Hence fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30 day of May, 1900.

2 Issued at office, in the city of Kansas City, under the seal of said court, the day and year last aforesaid.

ADELAIDE UTTER,
[SEAL.] *Clerk of said Circuit Court.*

MEM.—The defendant to enter his appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

ADELAIDE UTTER, *Clerk.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I do hereby certify that I executed this writ by delivering a true copy of the same, together with a duly certified copy of the bill of complaint in the cause, to J. M. McAnnulty. All done at Nevada, Mo., on this 31st day of May, 1900, and in the western division of the western district thereof.

E. R. DURHAM,
U. S. Marshal, Western District of Missouri.
By J. E. MORRISON, *Deputy.*

And on said 30th day of May, A. D. 1900, there was filed a restraining order in said cause in words and figures as follows:

3 In the United States Circuit Court, Western Division, Western Judicial District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING, S. A. WELTMER, and J. H. Kelly, Complainants,
vs.
J. M. McANNULTY, Defendant.

On the presentation to me, the undersigned, of the bill of complaint in the above-entitled cause and upon due consideration thereof it is—

Ordered that J. M. McAnnulty, the defendant above named, show cause before me, at my chambers in the post-office building, in the city of St Louis, Missouri, on June 9th, 1900, at ten o'clock a. m., or as soon thereafter as counsel can be heard, why the temporary injunction prayed for in said bill of complaint should not be granted, and that in the meantime and until action has been taken upon said application that the said J. M. McAnnulty, who is said to be postmaster at the town of Nevada, Missouri, his servants, agents, and employés, be, and they are hereby, enjoined and restrained from re-

turning such registered letters and mail as has been heretofore or may hereafter be received at the post-office at Nevada, Missouri, addressed either to the "American School of Magnetic Healing" or to "Professor S. A. Weltmer" or to S. A. Weltmer, as president or officer of the American School of Magnetic Healing, or to S. A. Weltmer individually, or to J. H. Kelly, as manager or as treasurer or as secretary of the American School of Magnetic Healing, or to J. H. Kelly personally, or to Professor J. H. Kelly, and that they and each of them do desist from doing the acts aforesaid
4 until the time aforesaid, and that they be further enjoined and restrained from stamping or writing the word "fraudulent" upon any of the mail matter aforesaid, notwithstanding any orders that said defendant, J. M. McAnnulty, may have heretofore received from any source to do or perform such acts.

It is further ordered that a copy of this order, together with a copy of the bill of complaint upon which the same was obtained, be forthwith served by the United States marshal of the western district of Missouri upon said J. M. McAnnulty, the above-named respondent.

Done at St. Paul, Minnesota, within the eighth judicial circuit, this 28th day of May, A. D. 1900.

(Signed) AMOS M. THAYER,
U. S. Circuit Judge, 8th Circuit.

Thereupon a duly certified copy of said order was placed in the hands of the marshal, and afterwards, on the 1st day of June, 1900, the marshal made return as follows:

Executed the within order of court by delivering a true copy of the same to J. M. McAnnulty. All done at Nevada, Mo., on this 31st day of May, 1900, and in the western division of the western district thereof.

E. R. DURHAM,
U. S. Marshal,
By J. E. MORRISON, *Deputy.*

5 And afterwards, to wit, on the 7th day of June, A. D. 1900, an answer was filed in said cause.

Afterwards, to wit, on the 12th day of June, 1900, comes the complainant S. A. Weltmer and files request to withdraw as a party to this cause. Said request is in words and figures as follows:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING ET AL.
vs.
J. M. MCANNULTY.

Comes now S. A. Weltmer and voluntarily withdraws as a plaintiff herein and requests the cause to — dismissed as to him, both in

his individual capacity and in his capacity as an officer, president and representative in any capacity of said American School of Magnetic Healing, and withdraws any request for injunction or relief in the capacities aforesaid.

Dated June 9th, 1900.

HARKLESS, O'GRADY & CRYSLER.
F. N. JUDSON.
OVERMYER & MULVANE.
HOSS & HOSS.

Thereupon the following order was filed:

6 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING, S. A. WELTMER, and J. H. Kelly, Complainants,
vs.
J. M. MCANNULTY, Defendant.

S. A. Weltmer, one of the complainants in the above-entitled cause, having filed a written request that he may be permitted to withdraw as a complainant in said cause and that the action be discontinued so far as he is concerned, both in his individual capacity and as an officer of the American School of Magnetic Healing, it is—

Ordered that said request be, and the same is hereby, granted, and that said S. A. Weltmer's name be expunged as a party to said cause.

(Signed) AMOS M. THAYER,
U. S. Circuit Judge.

Afterwards, to wit, on the 14th day of June, 1900, an order was filed in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING, S. A. WELTMER, and J. H. Kelly, Complainants,
vs.
J. M. MCANNULTY, Defendant.

7 Ordered that the rule to show cause why a temporary injunction, as prayed for in the bill of complaint herein filed, should not be granted, which order to show cause was filed on May 30, 1900, be, and the same is hereby, discharged, and that the restraining order contained in said rule to show cause be, and the same is hereby, revoked.

(Signed) AMOS M. THAYER,
U. S. Circuit Judge.

Afterwards, to wit, on the 11th day of July, A. D. 1900, an amended bill of complaint was filed in words and figures as follows, to wit:

8 UNITED STATES OF AMERICA:

In the United States Circuit Court, Western Division, Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. KELLY, Orators,
vs.
J. M. MCANNULTY.

To the honorable the judges of the circuit court of the eighth judicial circuit of the United States of America:

Come now your orators, The American School of Magnetic Healing and J. H. Kelly, and file this amended bill and, complaining to your honors, state:

That the American School of Magnetic Healing is a business corporation, incorporated under the laws of the State of Missouri, and that it and J. H. Kelly are residents and citizens of the State of Missouri and of and in the western division of the western district of said State.

That the respondent herein, J. M. McAnnulty, now is and at the times and dates hereinbefore mentioned was and for a long time prior thereto has been the postmaster in charge of the United States post-office at the city of Nevada, county of Vernon, State of Missouri, and is a resident and citizen of said State and of the said western division of the western district of the State of Missouri.

That said respondent at all times and dates hereinafter mentioned was and is the postmaster, agent, and officer of the United
9 States, having in charge and under his control as such postmaster and officer the exclusive management of the post-office at said city of Nevada and the exclusive charge and control of the receipt and distribution of mail received at said city of Nevada through the United States mails, either for distribution to the citizens adjacent to said post-office or received from citizens thereof, to be transmitted to the various parts of the United States from said post-office.

And your orators further state that the American School of Magnetic Healing is located and has its chief office and place of business at said city of Nevada, a city of a population of about 12,000 people.

That said J. H. Kelly now is and at all dates and times hereinafter mentioned was secretary, treasurer, and general manager of said corporation.

That about the month of February, 1897, J. H. Kelly located at said city of Nevada and engaged in the business of healing diseases and ailments of the human family, and the business of teaching the science of and instructing in the science of healing of human ills;

that immediately after locating at the place aforesaid he built up a large and lucrative business, and continued to build up such business and enlarge his business capacity until the month of April, 1898, when he incorporated said business, under the laws of the State of Missouri aforesaid, under the name of the American School of Magnetic Healing; that among the stockholders of said company was and now is J. H. Kelly.

That long prior to the happening of the grievances hereinafter complained of, in the furtherance of undertaking and building up his business and its interests, — erected large and extensive buildings owned and controlled by it at the said city of Nevada for the purpose of accom-odating, treating, and facilitating the treating of all kinds of diseases, and expended in and about the buildings and equipments thereof the sum of $50,000, and in and about their business have engaged in and caused to be placed throughout the United States large and extensive advertising matter, and have spent and invested in and about advertising and bringing before the public of the United States the virtues, facilities, and advantages and character thereof about $300,000.00, and have, in said establishment at said city and under their control, a large corps of assistants and employees, to wit, to the number of ninety.

That in and about their business they carried on and conducted, not only the treating of people afflicted with ills at their establishment at said city, but also engaged in the business of teaching and educating others in the practical science of healing, and that a large amount of their business consists of treatment by letter and advice to people throughout the United States and foreign countries, and in the treatment under said circumstances have built up a large and extensive business in the way of receipts of such treatment received through the United States mail, by letter, registered package, and otherwise, in the nature of checks, drafts, and United States moneys; that said business has grown to such an extent that immediately and for a long time prior to the grievances hereinafter complained of the receipts through the United States mails in the manner aforesaid for the treatment of persons throughout the United States and foreign countries *has* reached and averaged about from one thousand dollars to sixteen hundred dollars per day.

And your orators state that said business is a legal and legitimate business, conducted according to business and legal methods, and is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof.

And that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and discards and eliminates from its treatment what is commonly known as divine healing and Christian science, and is confined to practical scientific treatment emenating from the source aforesaid.

That for a long time previous and prior to the grievances hereinafter mentioned said corporation has been sending out a large

amount of advertising matter through the United States post-office at said city of Nevada, and that all of its receipts, by checks, drafts, or money order- aforesaid, *has* been received by and delivered to them through the United States post-office at the city of Nevada, of which the respondent herein has exclusive charge as postmaster aforesaid, and had, during the time aforesaid, been receiving a large number of letters addressed to said institution and to its office, regarding its treatment and manner of treatment, and business letters pertaining to and inquiring into the manner of treatment.

That all such mail, letters, — communications are generally addressed and directed to the American School of Magnetic Healing at said city, and that in many cases said letters are and may be addressed to said J. H. Kelly, secretary or treasurer or manager, or to J. H. Kelly individually, or to Prof. J. H. Kelly, or to J. H. Kelly, or Porf. J. H. Kelly, secretary, treasurer, or manager of the American School of Magnetic Healing.

That said Kelly is also receiving and for a long time past has been receiving letters addressed to him individually upon social matters from friends and acquaintances and concerning business not pertaining or connected with the business hereinafter stated.

12 That prior to the grievances hereinafter mentioned said institute was receiving in the way of letters addressed to it or to its officers in the manner aforesaid an average of about the sum of 3,000 letters per day, and ever since the happening of the grievances hereinafter mentioned there *has* been accumulating in said post-office letters belonging to your orator, addressed in the manner before stated, probably to the total number of 25,000 letters.

That all of said letters, as your orators are informed and believe, are duly stamped and ready for delivery to them but for the action of the Postmaster and Postal Department hereinafter mentioned.

And your orators now further state and inform your honors that heretofore, to wit, for some time prior to the first of May last, various parties and individuals, prompted by assumed competitive interference with their business, did complain to the United States Post-office Department, at Washington, that said institution was not engaged in legitimate business, and attempted to procure the department to take steps to interfere and prohibit the delivery of mail to said institution or any of its officers, so that on the 3rd day of May, 1900, the respondent in this case, under instructions from the Post-office Department, at Washington, which instructions were afterwards reduced to writing, under date of May 15th, 1900, refused on said day and ever since to allow and permit your orators to receive or have any of the letters so received at the post-office and addressed to them at Nevada, Missouri, or allow them to come into possession under any circumstances, or to acquire possession of, and ever since said date has and still does utterly refuse, although he has been requested to deliver or permit your orators to receive from said post-

13 office the large number of letters so addressed to them and remaining in the post-office aforesaid, or to permit them to hereafter receive or become possessed of any of such mail or

letters addressed to them in the post-office aforesaid, and has refused to and informed these orators that he will not cash any of the United States post-office money orders payable to them, or any of them, that *has* or may come through said office, and that since said date there *has* accumulated and now *is* on hand in said office, under the control of the respondent, letters to the number of about 25,000, properly stamped, and which your orators are entitled to receive and have.

And your orators further state that said letters contain, according to their best information and belief, checks, drafts, money, or money orders of the United States, payable to them or their order, for their use and benefit, to the extent of about $10,000 in value.

That said checks, drafts, money, or money orders contained in said letters addressed to your orators, as aforesaid, and which the respondent has refused to turn over, are from various customers and clients throughout the United States and foreign countries, who have all been treated, and for whom they performed services under contracts with said parties, and that said sums are so sent in the respective letters in payment for services performed and rendered to them respectively, and that all of said senders of remittances aforesaid are willing and at all times have been willing that said letters containing the remittances aforesaid should be turned over to your orators, and they making no objection or complaint thereto; and your orators further state that they have been informed by the said respondent that on Monday, the 28th day of May, he will stamp upon each and every one of said letters addressed to your orators under any of the designations hereto-
14 fore mentioned the word "fraudulent" across the face of each and every one of said letters, without opening them and without knowing what they contain or the contents thereof or what they may pertain to or the nature or character of the communications or anything therein, and on said date return the same to each and every sender of the letters respectively in all cases where from the outside of the letter or envelope he is able to determine from whom the same was received or sent, and as to all other of said letters and communications addressed to your orators under any of the designations hereinbefore mentioned and in all cases where he shall be unable to determine from the outside of the envelope from whom the same was sent or from whom the same was received he will stamp with the word "fraudulent" and send to the dead-letter office of the United States Post-office Department, and that said respondent will carry out this threat and will so return all of said mail matter unless prohibited from so doing by writ of injunction from your honors, and, as your orators here state and verily believe, will, and he threatens and informs your orators that he will, unless restrained therefrom, refuse to deliver any further mail or letters aforesaid to your orators or any of them that may be hereafter received at said post-office addressed to and directed in any of the modes aforesaid.

And your orators state that if said respondent is permitted to do the things aforesaid and to return said letters and refuse in the future to deliver or allow your orators to receive any letters or mail

matter of the character aforesaid it will work irreparable injury, loss, and damage to your orators, and result in eventually embarrassing, crippling, breaking up, and destroying their legitimate business aforesaid, and that they have no legal or adequate remedy by which they can in any way prevent the committing of the
15 acts and grievances herein complained of otherwise then by writ of injunction.

Your orators further state and inform your honors that they are informed and believe that the said respondent refuses to permit the delivery of said mail because he claims and insists, under the advice of the Post-office Department of the United States, that your orators have and are in the conduct of their business and receiving of the mail thereof from the United States post-office, as aforesaid, violating certain portions of the statutes of the United States known and designated as sections numbers 3929 and 4041, passed September 19th, 1890, and section 4 of an act approved March 2nd, 1895, which said statute reads as follows:

"Sec. 3929 of the Statutes of 1890, chapter 908, section 2. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmaster at any post-office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed with the word "fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmaster shall be by
16 them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme or device that remittance for the same may be made by registered letters to any other person, firm, bank, corporation or association named therein shall be held to be *prima facie* evidence of the existence of such agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself."

Sec. 4041 of the Statutes of 1890, chapter 908, section 2. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining

money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbids the payment by any postmaster to the said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders, but this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that the remittances for the same may be made by means of postal
17 money orders to any other person, firm, bank, corporation or association named therein, shall be held to br *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of any such agency in any other legal way."

"SECTION 4. That the powers conferred on the Postmaster General by the Statutes of 1890, chapter 908, section 2, are hereby extended and made applicable to all letters or other matter sent by mail. Approved March 2nd, 1895."

Your orators further state that on or about the 3rd day of May, 1900, the Postmaster General of the United States sent the following telegram to the respondent, to wit: "Postmaster, Nevada, Mo.: Withhold from delivery pending consideration for the issuance of a fraud order all mail addressed to S. A. Weltmer, J. H. Kelly, American School of Magnetic Healing, and S. A. Weltmer's infirmary, Nevada, Mo. Mail today will carry fuller explanation."

That upon the receipt of said telegram the respondent herein immediately obeyed the same and withheld from delivery all mail of every kind to your orators of the character and nature herein stated and failed and refused to deliver any mail to them until otherwise ordered by the Postmaster General; that afterward and before the 15th day of May, 1900, and in pursuance to notice from the Postmaster General, your orators went before the Postmaster General, at Washington city, and presented their reasons why no fraud order should be issued or continued against them, and the United States post-office inspectors in person and others also presented their reasons to the Postmaster General why a fraud order should be issued, and the Postmaster General heard such evidence as in his judgement was contemplated by the sections of the statutes heretofore mentioned; and thereafter, on the 15th day
18 of May, 1900, the Postmaster General of the United States issued an order directed to the respondent herein as postmaster at Nevada, Missouri; which order is in words and figures as follows, to wit:

"*Order No.* 475.

POST-OFFICE DEPARTMENT,
WASHINGTON, D. C., *May* 15, 1900.

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, president; J. H. Kelly, secretary, and J. A. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes, approved September 19, 1900:'

Now, therefore, by authority vested in him by said act and by the act of Congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States, approved March 2, 1895,' the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at
19 your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'fraudulent' plainly written or stamped upon the outside of such letters or matter: Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the dead-letter office, with the word 'fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

CH. EMORY SMITH,
Postmaster General.

To the postmaster, Nevada, Missouri."

That, acting upon said order and under the provisions of the statutes heretofore quoted, the respondent refused to permit the delivery of the mail aforesaid, and that respondent assigns as his only reason for doing so that the same would be in violation of the said order of the Postmaster General, founded upon the provisions of the Revised Statutes of the United States, heretofore set forth, and but for said order of the Postmaster General, founded upon the said statutes, the said respondent would not refuse the delivery of the mail aforesaid, and that said respondent claims that said statutory provisions of the United States, heretofore set forth, are legal and constitutional, and that the order founded thereon by the Postmaster

General is therefore properly issued, and that he is acting according to law in obeying and following said statutory provisions and the order of the Postmaster General founded thereon.

And that said claim of the respondent is the only claim or reason which he assigns or gives for the refusal to permit the delivery of said mail aforesaid.

20 And your orators inform your honors that said statute has no application whatever to the conducting or carrying on of their business; that their business is a legitimate one, and that no fraud, deceit, deception, or misrepresentation of any kind ever has been practised by them, and that their customers or clients do not claim or assert that your orators have in any manner practiced any fraud, deceit, or misrepresentation at any time in procuring the business from them or in treating or in curing their ills or diseases, and that they have not at any time violated or been parties directly or indirectly to the violation or infringement of the said law, and that the respondent is attempting, under advice and instructions aforesaid, to arbitrarily and by *ex parte* means *to* decide for himself and be the sole judge to determine that your orators have — or are violating said law and to take it upon himself to so assume and adjudge, when in truth or in fact he does not know or cannot know of the contents or nature of said letters or of their import or character, and undertake- arbitrarily to act as judge in his own case and to invade and infringe upon the rights of your orators without any adjudication or decision or hearing by any competent tribunal, court, or authority as to the property, interest, and right to determine said question, and has without authority deprived and seeks to deprive your orators of their property and property rights without due process of law.

And your orators further state and allege that the said provision of the law, to wit, the section of the statute of the United States heretofore mentioned, is in violation of the 4th, 5th, and 14th amendments of the Constitution of the United States and other provisions of the Constitution of the United States, in that the same undertakes to deprive persons and property and would deprive your

21 orators, if enforced, of their property and property rights without due process of law; and in fact it attempts and if enforced will place in power of the postmasters of the United States and of the Post-office Department of the United States the sole and exclusive right to pass upon the rights of your orators as between themselves and other parties with whom they deal and transact business through the mails without a hearing, and that said section and provision of the statute is void for the reason that it provided for no tribunal, court, or authority to hear and determine any violation of the statute or claimed violation of the statute, but placed the same absolutely in the power and control of the postmasters and the Post-office Department, and attempts to vest an arbitrary discretion in the postmasters and Post-office Department to determine for themselves, as they see fit, whether right or wrong, the question as to who shall and who shall not have and receive mail from the United States Post-office Department and who shall and who shall not use

the United States mails, and vests in them the power, if enforced, to interdict and absolutely prohibit the carrying on of all commercial and business transactions of the country done through the mailing system if they see fit so to do, and makes the postmasters and Post-office Department the sole judges in their own case.

Wherefore may it please your honors, and we, your orators, now pray, that you grant unto them your writ of injunction directed to the respondent herein, J. M. McAnnulty, postmaster, as aforesaid, at the city of Nevada, Vernon county, Missouri, in the western division of the western district of said State, enjoining and prohibiting him from returning, attempting to return, or taking any steps to return or aid in the return of any of the letters and mail matter of any kind now or that may hereafter be

22 in the post-office under his control, at the city of Nevada, Missouri, belonging to or addressed to the American School of Magnetic Healing, or to J. H. Kelly, as manager, or as treasurer, or as secretary of said corporation, or as manager, secretary, or treasurer, or to J. H. Kelly personally, or to Prof. J. H. Kelly, and that he at once desist from carrying out any such purpose or contemplated purpose, and that he be enjoined from interfering in any way with the future delivery of any such mail, and that he may be commanded to at once deliver and cause to be delivered upon request of your orators or any or either of them any and all letters or mail now in the post-office and under the control of the respondent at said city of Nevada, or that he may hereafter come into possession of, or that may come into his office or under his control as such postmaster, belonging to your orators or addressed to any of them under any of the designations or titles above stated, and that he continue to so deliver said mail until otherwise ordered by this court:

That a day may be set when and where the respondent may appear to show cause why this injunction shall not be made perpetual, and that upon the final hearing of this cause a perpetual injunction be issued to and against said respondent, his agents, officers, employees, or servants, enjoining him and them from doing, and enforcing upon him and them the doing, of all the matters herein set forth and complained of, and for all other and proper relief as to your honors may seem meet and proper, to the end that complete justice may be done to your orators herein.

HARKLESS, O'GRADY & CRYSLER,
Solicitors for Orators.

STATE OF MISSOURI, }
County of Vernon, } ss:

23 J. H. Kelly, being duly sworn, upon oath states that he is manager of the American School of Magnetic Healing and one of the complainants herein, and that the matters and things above stated are true as he verily believes.

J. H. KELLY.

Subscribed and sworn to before me on this 10th day of July, 1900.

JAY H. RINEHART,
[SEAL.] *Notary Public within and for Vernon Co., Kas.*

Commissioned and qualified for a term expiring March 12th, 1902.

Thereupon comes defendant, by his counsel, and files demurrer thereto; which demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. KELLY, Orators,
vs.
J. M. MCANNULTY, Respondent.

Demurrer to Complainants' First Amended Bill.

Now comes the defendant, by protestation, not confessing nor acknowledging all or any of the matters or things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, and doth demur thereto, and for cause of demurrer shows:

First. That the said complainants have not in and by their said bill made or stated any such cause as does or ought to entitle
24 them to any such relief as is thereby sought and prayed for from or against the defendant; and—

Second. Because complainants in and by the said bill have not stated any ground for equitable relief against this defendant nor any reason why an injunction should be granted.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

WM. WARNER,
Solicitor for Respondent.

I hereby certify that the foregoing demurrer is not interposed for delay; that the same is true in point of fact, and, in my opinion, is well founded in point of law.

WM. WARNER,
Of Counsel for Respondent.

Thereupon a decree was made and entered in said cause in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

WEDNESDAY, *July* 11, 1900.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. KELLY
vs.
J. M. MCANNULTY. } 2446.

Now come the above-named complainants, by their counsel,
25 Harkless, O'Grady & Crysler, and also the defendant, by Wm. Warner, United States attorney, and the complainants ask leave to file an amended bill of complaint herein, and, the defendant's counsel consenting thereto, it is ordered by the court that leave be, and is hereby, granted to file such amended bill of complaint, which is accordingly done. Thereupon defendant files demurrer to the said amended bill, and the same is submitted to the court, and the court, being fully advised in the premises, doth sustain said demurrer, and, the complainants declining to plead further in the premises, it is ordered and adjudged by the court that said amended bill of complaint be, and the same is, deemed insufficient in law and equity, and that the said bill be, and the same is hereby, dismissed at complainants' costs, and that defendant have execution therefor if the same be not paid within twenty days hereafter.

(Signed) JNO. F. PHILIPS, *Judge.*

And afterwards, and on the 12th day of July, 1900, the following assignment of errors was filed:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri.

Circuit Court.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. KELLY, Orators and Appellants,
vs.
J. M. MCANNULTY, Defendant and Respondent.

Assignment of Error.

Comes now the orators and appellants, American School of Magnetic Healing and J. H. Kelly, and files the following assignment of errors upon which they will rely:

26 1st. That the honorable circuit court erred in sustaining the demurrer to the complainants' amended bill for injunction and in holding the same to be insufficient in law and equity.

2nd. That the honorable circuit court erred in dismissing the complainants' amended bill and rendering judgment dismissing the same.

Dated this July 12th, 1900.

JAS. H. HARKLESS,
JOHN O'GRADY,
CHAS. S. CRYSLER,
Attorneys for Complainants and Appellants.

And afterwards, to wit, on the 14th day of July, 1900, a petition for appeal and order granting such appeal *was* filed. Said petition and order are in words and figures as follows:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. KELLY, Orators and Appellants,
vs.
J. M. McANNULTY, Defendant and Respondent.

The above-named orators, The American School of Magnetic Healing and J. H. Kelly, conceiving themselves aggrieved by the order entered on the 11th day of July, 1900, in the above-entitled proceeding, sustaining a demurrer to the plaintiffs' bill for an injunction, and dismissing the same, *doth* hereby appeal from
27 said order to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be certified and sent to the Supreme Court of the United States.

JAMES H. HARKLESS,
JOHN O'GRADY,
CHAS. S. CRYSLER,
Attorneys for Orators and Appellants, 7th Floor, American Bank Building, Kansas City, Missouri.

And now, to wit, on this 12th day of July, 1900, it is ordered that the appeal prayed for in above-entitled cause of The American School of Magnetic Healing and J. H. Kelly *vs.* J. M. McAnnulty be, and the same is hereby, allowed to the Supreme Court of the United States, as prayed for.

JNO. F. PHILIPS, *Judge.*

The bond for appeal in said cause is in words and figures as follows, to wit:

28 UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, American School of Magnetic Healing and J. H. Kelly and —— —— and —— ——, are held and firmly bound unto J. M. McAnnulty, his executors and administrators, in the sum of one thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of July, A. D. 1900.

Upon this express condition, to wit: Whereas the above-named American School of Magnetic Healing & J. H. Kelly have prose-

cuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri:

Now, if the above-named American School of Magnetic Healing and J. H. Kelly shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

AMERICAN SCHOOL OF MAGNETIC HEALING.
By J. H. KELLY, *Manager.* [SEAL.]
J. H. KELLY. [SEAL.]
H. M. DUCK. [SEAL.]
JAY RINEHART. [SEAL.]

Signed and sealed in presence of—
O. H. HOSS.
GUY F. NELSON.

The above bond is hereby approved and ordered to be filed and made a part of the record.

JNO. F. PHILIPS, *Judge.*

29 UNITED STATES OF AMERICA, *Western District of Missouri,* } ss:

J. H. Kelly, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides in Vernon county, western division of western district of Mo., and is worth over and above all his debts and liabilities the sum of twenty thousand dollars, and that he owns real estate to that amount subject to execution in the State of Missouri.

J. H. KELLY.

Subscribed and sworn to before me this 13th day of July, A. D. 1900.

[SEAL.] A. J. AYRES,
Notary Public within and for Vernon County, Mo.

My commission expires M'ch 30, 1903.

UNITED STATES OF AMERICA, *Western District of Missouri,* } ss:

H. M. Duck, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides in Vernon county, western division of western district of Mo., as stated therein, and is worth over and above all his debts and liabilities the sum of two thousand dollars, and that he owns real estate to that amount subject to execution in the State of Missouri.

H. M. DUCK.

Subscribed and sworn to before me this 13th day of July, A. D. 1900.

[SEAL.] A. J. AYRES,
Notary Public within and for Vernon County, Missouri.

My commission expires M'ch 30, 1903.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

Jay Rinehart, obligor in the within bond, being duly sworn, upon his oath deposes and says that he resides in Vernon county, western division of western district of Missouri, as stated therein, and is worth over and above all his debts and liabilities the sum of two thousand dollars, and that he owns real estate to that amount subject to execution in the State of Missouri.

JAY RINEHART.

Subscribed and sworn to before me this 13th day of July, A. D. 1900.

[SEAL.] A. J. AYRES,
Notary Public within and for Vernon County, Missouri.

My commission expires M'ch 30, 1903.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

——— ———, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth over and above all his debts and liabilities the sum of — dollars, and that he owns — to that amount subject to execution in the State of ———.

——— ———.

Subscribed and sworn to before me this — day of ———, A. D. 18—.

———, ———,
Comm'r U. S. Cir. Court, Western Dist. of Mo.

[Endorsed:] 2446. United States circuit court, western district of Missouri, western division. American School of Magnetic Healing & J. H. Kelly *vs.* J. M. McAnnulty. Bond for appeal on writ of error. Filed July 14, 1900. Adelaide Utter, clerk.

30 Said opinion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AMERICAN SCHOOL OF MAGNETIC HEALING, S. A. WELTMER, and J. H. Kelly, Complainants,
vs.
J. M. McANNULTY, Defendant.

Messrs. Harkless, O'Grady and Crysler (with whom were Mr. F. N. Judson and Mr. David Overmyer), for the complainants.

Mr. William Warner, United States attorney for the western district of Missouri, and Mr. Edward A. Rozier, United States attorney for the eastern district of Missouri, for the defendant.

THAYER, *Circuit Judge:*

On May 15, 1900, the Postmaster General, in pursuance of section 2 of an act of Congress approved September 19, 1890 (26 Stats., c. 908, p. 466), and by authority of section 4 of another act approved March 2, 1895 (28 Stats., c. 191, p. 964), directed J. M. McAnnulty, the defendant above named, who is postmaster at Nevada, Missouri, to return to the senders thereof all letters, whether registered or not, which arrive at said office addressed to the above-named complainants, and to stamp thereon the word "fraudulent," or to transmit said letters to the dead-letter office at Washington, D. C., to be disposed of as other dead matter under the laws relating thereto when there was nothing on said letters to indicate who were the senders of the same. This order contained
31 a finding by the Postmaster General, in accordance with the acts of Congress above mentioned, that it had been made to appear upon evidence satisfactory to him that the American School of Magnetic Healing, S. A. Weltmer, the president thereof, and J. H. Kelly, its secretary, were engaged at Nevada, Missouri, in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises. A bill of complaint was thereupon filed by the complainants herein, they being the same persons whose mail was interrupted by the aforesaid order, the object of said bill being to obtain an injunction restraining the postmaster at Nevada from obeying said order. A rule to show cause why a temporary injunction as prayed for should not be awarded has been duly issued and served, and the question to be determined at this time is whether the complainants on the showing made are entitled to the interlocutory relief prayed for.

Counsel for the complainants concede that it has been settled by at least two decisions of the Supreme Court of the United States (*Ex parte* Jackson, 96 U. S., 727; *In re* Rapier, 143 U. S., 110) that under the power conferred by the legislative branch of the Government to establish post-offices and post-roads Congress has full control of the entire postal system of the country and may lawfully determine what shall and what shall not be carried in the

mails, and that the judicial branch of the Government has no right to override or interfere with the will of Congress on that subject. They also concede the elementary proposition that whenever for the purpose of executing the laws an executive officer is vested by Congress with discretionary powers the courts can neither interfere by mandamus nor by injunction with the
32 exercise of such powers. Gaines *vs.* Thompson, 7 Wall., 237; Statesby *vs.* United States, 146 U. S., 196; Mississippi *vs.* Johnson, 4 Wall., 475; City of New Orleans *vs.* Paine, 147 U. S., 261; Noble *vs.* Union River Logging R'y Co., 147 U. S., 165. Notwithstanding these concessions, it is claimed, however, that in the present instance the postmaster at Nevada may be lawfully enjoined from obeying the order of his superior officer, and this contention appears to be based mainly on two grounds—first, that the order under which the postmaster is acting is void because the Postmaster General exceeded his authority under the statute in directing the return of "all letters, whether registered or not, and other mail matter;" and, second, that it is void because the statute under which the Postmaster General acted attempts to devolve on that officer powers which cannot be lawfully exercised by an executive officer.

The language of the statute on which reliance is placed to sustain the first of these propositions is as follows: "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretensions, representations, or promises, instruct postmasters at any office at which registered letters arrive directed to any such person or company or to the agent or representative of any such person or company, * * * to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'fraudulent' plainly written or stamped upon the
33 outside thereof." * * * By the fourth section of the act of March 2, 1895, the powers conferred upon the Postmaster General by the statute last quoted were extended to and made applicable "to all letters or other matter sent by mail."

It is manifest from an inspection of these statutes that Congress has in express terms conferred upon the Postmaster General the power to prohibit the delivery of any and all mail matter to a person whom that officer, after a due investigation, finds to be engaged in conducting through the mails either a lottery or a scheme to obtain money by false and fraudulent pretenses; and it is doubtless true that it intended to confer that power because of the difficulty which would generally be experienced in separating lawful mail matter from that which is unlawful, if the Postal Department was only authorized to withhold and return such letters as relate to the unlawful business in which a party is found to be engaged. Congress did not deem it expedient to cast on the Post-office Depart-

ment the duty of making inquiry or finding as to the character of every letter which was suspected to be non-mailable, when evidence was adduced which satisfied the Postmaster General that the party addressed was using the mails for the purpose of conducting a lottery business or to obtain money by fraudulent representations. The first ground of objection to the order, namely, that it is too comprehensive in its terms, is untenable and must be overruled.

In support of the second and most important objection to the order of the Postmaster General it is urged in substance that the right of a citizen to make use of such facilities as the Post-office Department at any time affords for the transportation of
34 mail matter is properly within the meaning of that word as used in the fifth amendment to the Federal Constitution; that the acts of Congress aforesaid under which the Postmaster General derived his authority to issue the order in controversy devolve on that officer the power to hear evidence, and to determine, in the light thereof, whether a person is engaged in a scheme to defraud; that as the result of such an adjudication a citizen may be deprived of his property by a proceeding before an executive officer which is essentially of a judicial character, and that such a power cannot be devolved upon an executive officer consistently with our theory of government. In other words, the second objection to the order of the Postmaster General necessarily involves the proposition that the statute under which he acted is in violation of the Federal Constitution and for that reason void.

The same propositions, in substance, were presented to the circuit court of appeals for the sixth circuit in Enterprise Savings Association *vs.* Zumstein, 67 Fed. Rep., 1000; *id.*, 15 C. C. A., 153, and were by that court held to be untenable. An attempt is made, however, to distinguish the case at bar from the case last cited because of the fact that in the latter case the complainants were alleged to be conducting a lottery, while in the case at hand the complainants were charged with using the mails to obtain money by false pretenses. It is said *arguendo* that although it may be that Congress can lawfully empower the Postmaster General to determine whether one is engaged in conducting a lottery, yet that the determination of the question whether one is engaged in a scheme to defraud is a different and more difficult inquiry, involving, as it does, a decision of mixed questions of law and fact, and that the power to decide questions of that nature, when a property right is involved, belongs exclusively to the judiciary and
35 cannot be delegated to an executive officer. The court is of opinion, however, that the reasons thus advanced for the purpose of avoiding the force of the decision in the sixth circuit are unsound. It is sometimes more difficult to analyze business ventures in which persons are engaged and determine whether they involve the essential features of a lottery than it is to determine with respect to other enterprises in which men may become engaged, whether they are schemes to defraud. In either case the officer exercises the same quasi-judicial functions such as have been exercised by the various executive departments since the foundation of the Govern-

ment, in that he hears proofs and decides issues of fact as well as questions of law. The power exercised and the consequences of its exercise are in each instance the same; therefore if it be true, as counsel for complainants seem to concede, that the Postmaster General may lawfully determine whether persons are conducting a lottery and deprive them of the use of the mails for that reason, it must be equally true that he may be empowered to determine whether persons are making use of the mails in furtherance of a scheme to defraud.

The questions at issue in this case were also elaborately considered by the supreme court of the District of Columbia in Dauphin *vs.* Key, Postmaster General, 11 Dist. Col. Rep., 203. The decision in that case arose under section 3929 of the Revised Statutes prior to the amendment thereof on September 19, 1890 (26 Stats., 466). Construing that section of the Revised Statutes which then as now authorized the Postmaster General to withhold and return mail matter which was addressed to persons who were found to be engaged in conducting lotteries or schemes to defraud
36 by the use of the mails, the court held, for reasons which commend themselves to this court as entirely sound, that the right which may at any time be accorded to a citizen by existing laws to use the mails for the transmission of mail matter is a mere privilege created by legislative enactment which may be modified or withdrawn by the same authority that created it, and that the privilege in question is not property in the constitutional sense of which one may not be deprived except in accordance with the judgment of some judicial tribunal or by due process of law. It was further decided in the same case that the statute was not intended to and that it did not in fact empower the Postmaster General to inflict punishment for a wrongful or criminal act. It was conceded by the court that a power to convict and punish a person for an offense could not, as a matter of course, be devolved upon an executive officer; but it was said of the legislation in question that it was not punitive in its character, but preventive, the sole object being to prevent the misuse of the mails and to arm the head of the Postal Department with power which would be adequate to accomplish that object.

It is hardly necessary to observe that if the right to use the mails as a statutory privilege and not property within the meaning of the fifth amendment to the Federal Constitution, then no fault can be found with the statute now under consideration, because it devolves on the Postmaster General the duty of ascertaining by satisfactory evidence if one is using the mails to defraud, and makes his right to use the mails dependent upon that finding. Congress has the right to exclude from the mails every species of mail matter that in its judgment ought not to be carried therein, and when it
37 determines, as it has done, that persons who are employing the mails for the purpose of conducting lotteries or schemes to defraud shall not be allowed to receive their mail, it can authorize an executive officer of the Postal Department to determine the fact on which the right to receive mail depends, by any appropriate method

of procedure, inasmuch as such determination of the fact does not, under the operation of the law, deprive the party concerned of his property or subject him to punishment for an offense within the meaning and intent of the organic law.

On the hearing of the motion for a temporary injunction much stress was laid in argument on the fact that the power conferred on the Postmaster General is of an arbitrary character, and if erroneously exercised at any time is liable to occasion great loss and inconvenience to the citizen. On this ground a strong plea was made that the court should, if possible, so construe the statute as to enable them to control the exercise of the power in question by reviewing the decision of the head of the Post-office Department in whom the power has been lodged. In answer to this suggestion, it is sufficient to say that in whosever hands power is lodged, whether in the judicial or executive branch of the Government, it is liable at times to be abused or erroneously exercised, and the fact that a particular authority may be abused is in itself no reason why a court should assume a jurisdiction to control its exercise which does not of right belong to it. Moreover, if the action of the Postmaster General was liable to be arrested on any and every occasion where a party complaining of his action sees fit to appeal to the courts it is probable that the statute would not afford an efficient means for preventing the misuse of the mails as Congress intended it to afford; but be this as it may, the court is satisfied that it cannot lawfully
38 grant a temporary injunction. The motion to that effect is accordingly denied, and the rule to show cause why a temporary injunction should not issue is discharged.

39 UNITED STATES OF AMERICA, *sct:*

I, Adelaide Utter, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the above and foregoing is a true copy of the record, assignment of errors, and all proceedings in the case as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office in Kansas City, Missouri, this 4th day of August, A. D. 1900.

{Seal of the United States Circuit Court, Western Division, for the Western District of Missouri.}

ADELAIDE UTTER, *Clerk.*

{Ten-cent United States internal-revenue stamp, canceled 8, 4, '00. A. U.}

Endorsed on cover: File No., 17,887. W. Missouri C. C. U. S. Term No., 146. American School of Magnetic Healing and J. H. Kelly, appellants, *vs.* J. M. McAnnulty. Filed August 23rd, 1900.

No. 27
Brief of Statement for Appellants

Office Supreme Court U.S.
FILED
SEP 30 1901
JAMES H. MCKENNEY,
Clerk.

Filed Sept. 30, 1901.

Supreme Court of the United States

IN THE

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING AND J. H. KELLY, *Appellants,*

vs.

M. McANNULTY, *Appellee.*

No. 146.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT AND BRIEF

In Behalf of Appellants.

JAMES H. HARKLESS,
Counsel for Appellants.

JOHN O'GRADY.
CHAS. S. CRYSLER.
Of Counsel.

Rudd & Stone, Pub. Tel. 1050.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING AND J. H. KELLY, *Appellants,*

vs.

J. M. McANNULTY, *Appellee.*

No. 146.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT.

This is a proceeding by injunction, the object and purpose of which is to enjoin the Appellee, J. M. McAnnulty, Postmaster of the City of Nevada, in the Western Division of the Western District of Missouri, from seizing and detaining the mail of the Appellants, and presents for this Court's consideration, the constitutionality of certain sections of the Statute of the United States, which permits the Postoffice Department without notice, hearing or opportunity for hearing, and arbitrarily to order the interdiction and seizure of mail of any party they may see fit, even though such mail matter be innocent and properly mailable.

HISTORY OF PROCEEDINGS.

On the 28th day of May, 1900, at St. Paul, Minnesota, the Appellants and complainants presented to the Honorable Amos M. Thayer, one of the United States Circuit Judges of the Eighth Circuit, a petition and application for injunction against the Appellee, J. M. McAnnulty, which petition was duly verified and under which petition Judge Thayer issued an order commanding the Appellee, J. M. McAnnulty, to show cause in the City of St. Louis, Mo., on June 9th, 1900, why a temporary injunction as prayed for in the bill should not be granted and in the meantime, ordered that the Appellee J. M. McAnnulty, Postmaster as aforesaid, be enjoined and restrained from returning such registered letters and mail as had been theretofore and might be thereafter received at the Postoffice at Nevada, Missouri, addressed to the Appellants by any designation, and enjoining him from stamping or writing the word "fraudulent" upon any of the mail matter aforesaid.

Afterwards on June 9th, being the returned day of the order aforesaid, the respective parties appeared before his Honor, Judge Thayer at St. Louis, Mo., at which time the cause was dismissed by one of the co-plaintiffs, S. A. Weltmer, as to himself, leaving the cause stand as to parties as now entitled. Thereupon an argument was had before Judge Thayer and after keeping the same under advisement until the 14th of June, Judge Thayer in vacation ordered that the prayer of the bill should not be granted and that the order theretofore made restraining the Appellee, J. M. McAnnulty be discharged and revoked; at the time handing down an opinion in writing which is found pages 19 to 23 of the record and which opinion of Judge Thayer is reported in full in Volume 102, Page 565 Fed. Reporter.

And thereafter the cause coming on regularly for hearing in the Western Division of the Western District of Missouri at Kansas City on July 11th, 1900, Honorable John F. Phillips, presiding, the complainants filed an amended bill for injunction

which was practically the same as the first one presented before Judge Thayer, except that it was somewhat more specific; which said amended bill appears commencing on Page 5 of the record.

Immediately after filing the amended bill and on the same day the Appellee, McAnnulty, filed his demurrer thereto and the Court, his Honor, Judge Phillips, presiding, adopted the opinion of Judge Thayer and sustained the demurrer to the bill and entered on said July 11th, 1900 an order sustaining the demurrer and complainant, declining to plead further, ordered the bill dismissed for the reason that it was insufficient in law and equity.

Appellants duly excepted to the ruling and order of the Court at the time and afterwards on July 12th, 1900, filed the following Assignment of Error:

ASSIGNMENT OF ERROR.

First: That the Honorable Circuit Court erred in sustaining demurrer to the complainants' amended bill for injunction and in holding the same to be insufficient in law and equity.

Second: That the Honorable Circuit Court erred in dismissing the complainant's amended bill and rendering judgment dismissing same.

On July 14th petition for appeal and order granting appeal was duly filed and order of appeal entered in the Supreme Court of the United States and appeal bond duly filed.

SUBSTANCE OF THE PETITION.

As the question to be discussed here arises upon sustaining a demurrer to the petition for injunction, we for convenience state the substance of the allegations therein.

The petition alleged that the American School of Magnetic Healing, a corporation, and J. H. Kelly, were residents and citizens of the Western Division of the Western District of Missouri; that J. M. McAnnulty was the Postmaster in charge of the United

States Postoffice at the City of Nevada, Mo., and as such had control of the Postoffice and the exclusive management thereof and of the receipt and distribution of mail received and sent out at and from said office, to the citizens of the United States and elsewhere; that said City of Nevada had a population of about 12,000 people. That J. H. Kelly was the General Manager, Secretary and Treasurer of the American School of Magnetic Healing that had its chief office and place of business at said city of Nevada; that about the year 1897 said Kelly located at said city of Nevada and engaged in the business of healing diseases and ailments of the human family and of teaching the science of and instructing in the science of healing of human ills, He built up a large and lucrative business until in April, 1898, when he incorporated the business under the name of the American School of Magnetic Healing and that Kelly was one of its principal stockholders. That they built large and extensive buildings in such city and equipped the same at a cost of $50,000.00 and caused to be placed throughout the United States large and extensive advertising through magazines, papers and otherwise at a cost of about $300,000.00 and had some ninety (90) employees in the institution at Nevada. That in and about their business and the transacting of the same a large amount of their business consisted of receiving letters,, advices, money orders, drafts and checks through the mail and the sending out of advertising matter and that the business had grown to such an extent, not only in the United States but in foreign countries as the receipts from the business had reached the sum of $1,600.00 per day. Petition alleges that the business is legitimate business conducted according to business and legal methods and that the principle idea in the treatment of disease was predicated of the fact that the human race possess the innate power through proper exercise of the faculties of the brain and mind, to largely control and remedy the ills that humanity is heir to. That all their checks, drafts and money orders and mail were received and

delivered through the Postoffice at Nevada, Mo., and enclosed, as well as letters in sealed envelopes addressed to the complainants under various designations. That Mr. Kelly was also receiving from time to time social and business letters addressed to him individually from his friends and acquaintances. That at the time of suing out the injunction there was coming through the office at Nevada addressed to complainants about 3,000 letters per day and that at the time of presenting the injunction, letters in the neighborhood of 25,000 addressed to complainants were in the office at Nevada held by the Postmaster, all of which mail was duly stamped and ready for delivery to the complainants. Petition then alleges that various parties made complaint to the United States Postoffice Department at Washington that the Institution conducted by complainants was not engaged in legitimate business and that the respondent, J. M. McAnnulty, Postmaster, on the 3rd of May, 1900 acting under instructions from the Postoffice Department at Washington, which instructions were afterwards reduced to writing under date of May 15th, 1900, refused to allow the complainants to receive or have any of the letters addressed to them or allow them to have possession of them under any circumstances: and from that date continually refused and do yet refuse to deliver to them the mail in the Postoffice or permit them to have possession of it, or the said Kelly of any mail addressed to him in any capacity without regard to what the character thereof was.

That said mail contained money orders, money in cash, drafts, checks and remittances generally from their customers throughout the country. That the Postmaster on said date and ever thereafter under direction from the Postoffice Department, stamped all of said letters with the word "fraudulent" across the face thereof without opening them and without knowing what they contained, who they were from or of what nature or character the communications were, and returned to the senders thereof, where the name and address of the sender could be known,

and in all other cases, letters were directed to and were returned to the dead letter office of the United States Postoffice Department and that the Department threatened to continue to so treat said mail and did and will in the future continue to refuse to allow the complainants to have any mail of any character through said Postoffice unless restrained by injunction. That the conduct aforesaid would work irreparable injury and damage to the complainants and break up their business. That the Postoffice Department was attempting to act under the authority of and by virtue of certain statutes of the United States known and designated as Sections 3929 and 4041, passed Sept. 19th, 1890, and Section 4 of an act approved March 2nd, 1895.

FRAUD ORDER STATUTES.

The sections of the statute as set out in the petition and which are the statutes out of which this controversy arises, are as follows:

Sec. 3929 of the Statutes of 1890, chapter 908, section 2:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct the postmaster at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed with the word "fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmaster shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to him-

self. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme or device that remittance for the same may be made by registered letters to any other person, firm, bank, corporation or association named therein shall be held to be prima facie evidence of the existence of such agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself."

Sec. 4041 of the Statutes of 1890, chapter 908, section 2:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to the said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders, but this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that the remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of any such agency in any other legal way." (Approved Sept. 19th, 1890.)

"Section 4. That the powers conferred on the Postmaster General by the Statutes of 1890, chapter 908, section 2, are hereby extended and made applicable to all letters or other matter sent by mail." (Approved March 2nd, 1895.)

Petition then alleges that on the 3rd day of May, 1900, the Postmaster General of the United States sent the following telegram to the Postmaster, J. M. McAnnulty, to-wit:

"Postmaster, Nevada, Mo.: Withhold from delivery pending consideration for the issuance of a fraud order all mail addressed to S. A. Weltmer, J. H. Kelly, American School of Magnetic Healing and S. A. Weltmer's Infirmary, Nevada, Mo. Mail today will carry fuller explanation."

That the postmaster at Nevada, Mo., immediately obeyed the same and withheld all such mail as mentioned in said telegram and refused and ever thereafter has refused to allow and permit the complainants to receive the same. That thereafter the Post-office Department took up the matter further and on May 15th, issued the following order:

ORDER NO. 475.

Postoffice Department.
Washington, D. C., May 15, 1900.

"It having been made to appear to the Postmaster General upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, President; J. H. Kelly, Secretary, and J. A. Kelly, at Nevada, Mo., are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes approved Sept. 10th, 1900.'

"Now, therefore, by authority vested in him by said act and by the act of Congress entitled "An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States, approved March 2, 1895, the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered

to the senders thereof, with the word "fraudulent" plainly written or stamped upon the outside of such letters or matter: Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the dead-letter office, with the word "fraudulent" plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto."

CH. EMORY SMITH, Postmaster General.

To the Postmaster, Nevada, Missouri.

Petition then alleges and charges that these statutory provisions of the United States heretofore set forth are unconstitutional and void and sets forth that no fraud, deceit, deception or misrepresentation of any kind is or ever has been practiced by the complainants and that none of their customers or clients claim or assert that the complainants have in any manner practiced any fraud at any time in procuring their business or in curing their ailments and that the respondent was arbitrarily and by ex parte means deciding for himself and claiming to be the sole judge to determine whether complainants were or were not violating these statutes and was taking it upon himself to be the judge when in truth and in fact he did not and does not know and could not and cannot know of the nature of said letters, of their import or character and was undertaking arbitrarily to act as judge in his own case and infringe the rights of the complainants without any adjudication or hearing by any competent tribunal, court or authority and seeking to deprive the complainants of their property and proper rights without due process of law.

The petition then alleges that the statutes above mentioned are in violation of the 4th, 5th and 14th amendments of the constitution of the United States and that the same undertake to deprive persons and property and would deprive the complainants if enforced, of their property and property rights without due process of law and if enforced would place in the power of the

Postmasters of the United States and the Postoffice Department, the sole and exclusive right to pass upon the rights of the complainants as between themselves and with other parties with whom they deal and transact business through the mails, without a hearing and that said provisions of the Statute are void for the reason that no tribunal, court or authority is provided to hear and determine any violation of the statute or claimed violations thereof and attempts to vest an arbitrary discretion in the postmasters and the postoffice department to determine for themselves as they see fit whether right or wrong, the question as to who shall and who shall not have and receive mail from the United States Postoffice and who shall and who shall not use the United States mails and vests in them the absolute power to interdict and prohibit the carrying on of all commercial and business transactions of the country through the mailing system if they see fit to do so and makes the Postmasters and Postoffice Department sole judges in their own case.

Petition then concluded with general prayer for injunction prohibiting the Postmaster from doing or attempting to do any of the things complained of in the petition and that he might be ordered to turn over all mail addressed to complainants as was properly stamped and be enjoined from further interfering in the delivery of the mail.

A demurrer having been sustained to this petition for the purposes of this case, all the facts therein set forth must be accepted as true. The trial court took the view that inasmuch as Congress had passed the Statute above referred to and vested in the Postmaster General the power to interdict the mail of any party, that it was a matter wholly within the power of Congress and that the citizen had no remedy other than the Postmaster General should direct. This decision and this right, we respectfully challenge.

BRIEF AND ARGUMENT.

I.

The Appellant challenges the constitutionality of the statutes above set forth which authorize the Postmaster General without trial, or inquiry of any kind to arbitrarily interdict the honest mail of any citizen of the United States under the circumstances alleged in the bill. These statutes violate the 4th amendment to the constitution of the United States reading as follows:

Art. 4 "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall be issued but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

And violated the 5th amendment to the constitution of the United States which reads as follows:

Art. 5. "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. Nor to be deprived of life, liberty or property without due process of law. Nor shall private property be taken for public use without just compensation."

And violates Section 8 of Article 1, of the Constitution, which provides that Congress shall have sole power to establish postoffice and post roads and adopt regulations for the Postoffice Department.

The question of the constitutionality of these statutes has never been presented to this Court and the construction to be placed upon the Federal Statutes is never settled until the Supreme Court of the United States has passed on it.

124 U. S., 694. *Andrews vs. Hovey.*

The sections of the United States statute referred to in the petition and which are attacked as unconstitutional are 3929 and 4041 Statutes of 1890, chapter 908 section 2, and the amendment to these two sections passed March 2nd, 1895, found in Vol. 28 of the United States Statutes at Large at pages 963 and 964, but they are correctly set forth above in our statement.

As to whether these statutes are constitutional, there is claimed to be some conflict between the decisions of the several circuit and district courts that have had this specific subject under consideration, but we contend that there is no conflict and that if there is the weight of authority and of reason sustains the proposition that these statutes are unconstitutional in that they deprive persons of property and property rights without due process of law as inhibited by the 5th amendment to the constitution and also are unconstitutional for the reason that they authorize in effect the seizure of property without warrant and arbitrarily in violation of the 4th amendment to the constitution of the United States and are in violation of Section 8 of Article 1 of the United States Constitution.

We shall first call the Court's attention to such decisions as in our judgment sustain the proposition that these statutes are unconstitutional.

81 Fed. Rep., 472, *Hoover vs. McChesney.*
87 Fed. Rep., 415, *Fairfield Floral Co. vs. Bradbury.*
134 U. S., 418, *C. M. & St. P. Ry. vs. Minnesota.*
50 Fed. Rep., 406, *United States vs. Rider et al.*
45 Fed. Rep., 178, *United States vs. Keokuk & Hannibal Bridge Co.*
116 United States, 616, *Boyd vs. United States.*

The case first above cited, *Hoover vs. McChesney*, 81 Fed. Rep., 472, was a decision by the United States Circuit Court in Kentucky, Judge Barr rendering the opinion. In that case the

Postoffice department had undertaken to issue and did issue a fraud order similar to the one issued in the case at bar and a like attack was made upon that proceeding as is made in this case. Judge BARR in delivering the decision of the Court while recognizing that Congress has the right to regulate the manner and mode of transacting the mail business of the United States, said after referring to certain older decisions of the Supreme Court of the United States, to which we shall hereafter advert:

"While the Supreme Court has thus indicated the general power of Congress to determine what matter shall be excluded, it has not yet we think decided that Congress has the power to delegate to any executive officer the power to determine the person or persons who shall be excluded from the right of sending or receiving mail by the postal service. If we understand the trend of the decision it has not yet been decided that either Congress or an executive officer has the right under this power to exclude any particular person or any class of persons, citizens of the United States from the benefits arising from the use of the postal service of the United States."

Further in the opinion he says:

"If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right, then it must follow that the order of the 17th of February, 1896, of the Postmaster General (fraud order) which finds complainant guilty of a violation of the postal laws and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned during his pleasure is not due process of law within the constitutional meaning. In this connection we think the 4th amendment to the constitution is also applicable which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure shall not be violated, etc."

And further:

"Whether we regard these letters which were sent through the mail properly addressed and in the hands of the defendant as belonging to the sender or to the complainant to whom they were sent, they should be and are constitutionally equally exempt from seizure except under the provisions of the constitution. When, therefore, sealed letters and packages were seized by the defendant under the order of Feb. 17th, 1896, without warrant and marked "fraudulent"

and returned to the dead letter office to be there disposed of as other dead matter under the laws and regulations, we submit that this provision of the constitution has been violated."

And again the learned judge says:

"We fully recognize that the Court in taking jurisdiction is not asked either to compel by mandatory injunction or by restraining order, the performance of a ministerial duty. We fully recognize the settled doctrine as announced in the case of *Gaines vs. Thompson*, 7th Wall 347, and the various other cases therein reviewed and since that time as well as the authority of the case of *Enterprise Sav. Ass'n vs. Zumstein*, 15 CC., 153, 67th Fed. 1000. But we however submit that if correct in our view *Congress had no constitutional rights to give to the Postmaster General the authority thus to prohibit to a citizen of the United States without notice and without trial the use of the postal service of the United States at his pleasure because he became satisfied that that citizen had been or was engaged in conducting a lottery or similar enterprise.*"

This case in our judgment is the most exhaustive one on the subject and reviews and harmonizes with every other case affecting this question and holds that these sections of the statute which give the Postmaster General or any other Postmaster the right to arbitrarily hold up, interdict and prohibit without notice, hearing or opportunity for hearing the delivery of proper and honest mail to any citizen of the United States violates both the 4th and 5th amendments of the constitution of the United States. The 4th amendment because of the fact that it permits the absolute seizure and taking away of the mail of the citizen and of his property right thereto, without warrant, without trial, without hearing, upon the motion of the Postmaster General arbitrarily and of his own volition. And that it violates the 5th amendment of the constitution because it is taking the property and property right of the citizen without due process of law and also holds as we contend that the right of the citizen to the use of the mails is a property right and that the letter or package which is put into the United States Postoffice duly sealed, becomes the property of the citizen. Indeed it would be idle in our

judgment to argue that mail matter when deposited in the Postoffice directed to the party was not his property and a property right. There is certainly in this case and under these facts a seizure of the mail, because instead of delivering it to the complainants it is returned by the Appellee, the Postmaster, to the dead letter office there to be opened and destroyed or otherwise disposed of as the Postoffice Department might order. And these letters deposited in the Postoffice and retained in the Postmaster's office at Nevada, Mo., contained money, drafts, checks, as well as written information and these certainly were the property of the complainants and certainly constituted such property and property rights as come within the protection of the 5th amendment to the constitution of the United States, which provides that no party shall be deprived of his property without due process of law.

The next case above cited, 87 Fed. Rep., 415, *Fairfield Floral Co. vs. Bradbury*, decided 1898 by the United States Circuit Court in Maine is worthy of consideration. This was an application for an injunction in which the Postmaster at Fairfield, Maine, acting under a fraud order founded on these same sections of the Statute now under consideration and issued by the Postoffice Department, undertook to and did retain the mail of the complainant therein and in rendering an opinion in that case the learned Circuit Judge PUTNAM said:

"If I were free to follow my own judgment I should say that Congress neither directly nor through the Postmaster General or anyone else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial. But I am not sure that I will be able to follow my own convictions in this case even though in a final hearing they remain as they now stand. I am not sure that I will not be bound by the decisions of the Court of Appeals in the 6th circuit, *Association vs. Zumstein*, 67th Fed. Rep. 1000, when the case comes to a final hearing. My own view is that the decisions of the Court of Appeals in our circuit should ordinarily be followed quite implicitly by the

courts in other circuits. The case in the 6th circuit does not seem to have been taken to the Supreme Court. I cannot find anything to indicate that it was taken up by writ of error or otherwise and it seems to have been left on the decision of the Court of Appeals so that it stands today the highest judicial authority which we have on the validity of the statute."

So that it will be seen that this Court also was of the opinion that this statute and the power given to the Postoffice Department under it violated the constitution. He yielded himself to the decision of the court in the Zumstein case, which is a decision that will be cited we presume in opposition to our views and which we will call attention to further on in the argument of the cause. It will be further noticed that Judge Putnam did not refer to the decision in the 81 Fed. by Judge Barr, in support of his opinion for the probable reason that it was not called to his attention.

But we contend that the Supreme Court of the United States in the case above cited *C. M. & St. P. Ry. vs. the State of Minnesota,* has decided a question which must of necessity determine the case we have under consideration now. In that case it appeared that the legislature of the State of Minnesota in 1887 passed an act to regulate common carriers and creating warehouse and railroad commissioners for the State of Minnesota and defining certain duties in relation to common carriers and provided for the appointment of a commission of three persons to carry out the provisions of the act. The act further provided that transportation companies should establish certain reasonable rates and that in case the commissioners should find that at any time any parts of the tariffs or charges so filed or published were in any respect unequal or unreasonable it should have the power and it was authorized and directed to compel the common carriers to change the same and adopt such changes as the commission should declare to be equal and reasonable: And gave the commissioners authority to issue orders in writing as to what

should be done in that regard and if the carriers neglected within ten days to conform to and adopt the tariffs recommended by the commission, the commission should publish the tariffs itself and cause it to be posted on the lines of the road and it should be unlawful for any carrier thereafter to charge a higher or a lower rate and that if the common carriers should fail to carry out the recommendation they should be subject to writ of mandamus to be issued by the courts of the State on the application of the commission to compel compliance with the requirements of the commission and that a failure to comply with the mandamus should be punishable by contempt and that the commissioners might apply for injunction to prohibit the carriers from transporting freight or passengers until it had complied with the requirements of the commission.

Complaint was filed with the commissioners that the Railroad Company had fixed unreasonable charges between certain points and asking the commissioners to change the same and adopt rates under the provisions of the Minnesota statutes and the commission undertook to have the Railroad Company heed the complaint. The Railroad Company declined to yield to it. Thereafter the commission undertook to fix certain rates which the Railroad Company contended were unreasonable and failed to comply with and thereafter the Attorney General applied to the Court for a writ of mandamus to compel the Company to comply with the commissioners' recommendations and adopt the tariffs fixed by that commission. The Railroad Company filed its reply to this writ setting up first:

That it was not competent for the legislature of Minnesota to delegate to a commission a power of fixing rates for transportation and in so far as it attempted to do so it was void under the constitution and that such proceeding and authority if enforced would be depriving the Company of its property without due process of law in violation of the constitution of the United States and that the establishment of rates to which it must con-

form was pro tanto taking property without due process of law. The Supreme Court of the State decided this contention adversely to the railroad Company and the case was appealed to this court.

This court in disposing of that case said that the construction put upon the statute by the Supreme Court of Minnesota must be accepted and that that Court had declared that the rates recommended and published by the commission were not simply advisory but were final and conclusive as to what are equal and reasonable charges. And that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact, and that under the statute the rates published by the commissioners are the only ones that are lawful and therefore in contemplation of law the only ones that are equal and reasonable. And that in a proceeding for a mandamus there was no fact to traverse except the violation of the recommendations of the commissioners, in other words, that the Supreme Court of Minnesota had decided that these rates being fixed, there was no power in the court to stay the hands of the commissioners or interefere with it. This Court accepting this as the construction of the Statute by the Supreme Court of Minnesota then proceeded as follows:

"This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that so construed it conflicts with the constitution of the United States in the particulars complained of by the Railroad Company. It deprives the Company of its right to a general investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and substitutes therefor, as an absolute finality the action of a railroad commission, which in view of the power conceded to it by the State Court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

This Court then further said:

"No hearing is provided for, no summons or notice to the Company before the Commission has found what it is to find and

declared what it is to declare. No opportunity provided for the Company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law. And although in the present case it appears that prior to the decision of the commission the Company appeared before it by its agents and the commission investigated the rates charged by the Company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at."

And again further says:

"If the Company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery it is deprived of the lawful use of its property and thus in substance and in fact of the property itself without due process of law and in violation of the constitution of the United States and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the Company is deprived of the equal protection of the laws."

Let us apply the facts in that case to the one under consideration and see how that decision must necessarily decide this one. Here we find under these provisions of the Statute that the Postmaster General upon evidence satisfactory to himself that any person is violating the postal laws as therein mentioned, or is conducting any scheme or is obtaining money or property through the mails improperly, may instruct Postmasters anywhere in the United States at which letters are directed to any Company or person, to return all such letters to the Postmasters at the offices at which they were originally mailed with the word "fraudulent" plainly written or stamped on the outside thereof. And that such letters shall be returned to the writers under regulations. And under section 4041 above cited, the Postmaster General upon evidence satisfactory to him that any person is improperly using the mails as therein provided may forbid the payment by the Postmaster of any postal money orders drawn in favor of any such persons and may stop the delivery of any mail without regard to its character, and in turning to the fraud order set out on the record on page 11, we find that the Post-

master General ordered the Postmaster at Nevada, Mo., the Appellee, to return all letters whether registered or not and all other mail matter which should arrive at his office directed to the complainants to the Postmasters at the offices where they were originally mailed to be delivered to the senders thereof with the word "fraudulent" plainly written or stamped on the outside of such letters or matter, etc.

Now what do we find is the result of this situation? We find that a Postmaster without any inquiry whatever, without trial, without hearing, without notice, upon evidence satisfactory to himself, and without any means by any course of law being provided of ascertaining, whether the information satisfactory to himself was true or false, proceeding arbitrarily to interdict and tie up the mail of every kind, nature and description belonging to these complainants no matter what the letters contained whether they were business, social or friendly letters, whether they contained valuable property or not and without regard to whether they were innocent or fraudulent and without any examination, and indeed he could have made no examination for the statutes expressly prohibit him from opening them to find out what they are. This statute, if valid, authorizes the branding of all mail fraudulent whether it is or not and strange to say this power is to be not only exercised by the Postmaster without any inquiry, notice, trial or hearing, but no remedy of any kind is provided by the statute for inquiry into the fact even afterwards. He is made the sole judge in the case.

If these sections are constitutional and if this proceeding does not violate the constitution of the United States in the particulars we have stated, then we misunderstand the decision in the case against the State of Minnesota above cited.

If that decision is to stand then it is controlling in this case. As said by the court in that case we may say in this one, it deprives these complainants of a judicial investigation by due process of law under the forms and with the machinery provided

by the wisdom of successive ages for the investigation judicially of the truth of a matter and substitute therefor, as an absolute finality, the action of a Postmaster General. As said in that case, we may say in this one: "No hearing is provided for, no summons or notice to the complainants before the Postmaster General has found what he is to find and declared what he is to declare. No opportunity provided for the complainants to introduce witnesses before the Department, in fact nothing which has the semblance of due process of law." And we may go further than that case and say in this one that the mail may be taken absolutely from the complainants sent back to the parties who originally sent it or sent to the dead letter office and destroyed, their drafts and checks destroyed or returned to the parties who sent them without any proof or showing or intimation that the parties who sent them desire to have them returned or that they were not perfectly willing that they should be turned over to the complainants and strange to say that these statutes and this proceeding is all undertaken arbitrarily upon evidence satisfactory to the Postmaster General and no appeal is allowed, no way of ever correcting his decision if wrong, or of inquiring into the right of it or of ever knowing whether it was right or wrong. If this can be done, the Postmaster General of the United States could stop the commercial business of this country or he could single out any single person or firm and absolutely destroy its business without remedy. He is simply a ministerial officer in no way liable for his acts, has no bond upon which either party could sue, no remedy by action lies against him if these statutes are constitutional.

Because the question as to whether the evidence is satisfactory to him is a matter not subject to investigation and when the statutes said "upon evidence satisfactory to him," it absolutely in effect says nothing because the power to determine that the evidence is satisfactory to him is the power to determine that it shall be done in any event and it must be borne in mind that for

the purposes of this case the mail, drafts, moneys, checks and other property rights contained in the letters are the subject of honest negotiation and commerce so far as this bill is concerned. If these statutes are to be held constitutional and this authority of the Postmaster held to not violate the constitutional provision, then it can be seen at once that the Postmaster General if he saw fit to do so could prevent by issuing his fraud order, the delivery of mail or the transaction of business between each and every city in the United States or could if he saw fit give to one person the absolute right to use the mails in a certain business and arbitrarily prohibit another from using them for a like purpose.

Not intending by these arguments to intimate that the Postmaster General would do so but in discussing the constitutionality of the Statute we must discuss it from the view point of the pernicious effects of its enforcement under all circumstances as well as its beneficial ones.

The case above cited from the 50 Fed. Rep., 406, *United States vs. Rider* is particularly commended to the Court's consideration. It will be seen that that case which follows and adopts the decisions of the *U. S. vs. Keokuk & Hannibal Bridge Co.*, 45 Fed. Rep. 178, presented the question of the constitutionality of an act by which Congress had provided that the Secretary of War when he should have reason to believe that any bridge is an obstruction to free navigation should give notice requiring the bridge to be altered so as to render navigation through or under it easy and unobstructed.

The decision in that case was based upon a statute which in its scope and effect was precisely the same as the statutes under consideration. About the only difference in the reading is that in that case, it said "Whenever the Secretary of War shall have good reason to believe, etc." and in the statutes under consideration it reads "upon evidence satisfactory to the Postmaster

General, etc.," so that both of the statutes are precisely the same upon the question of delegating power to the heads of departments who undertake the legislation. That court said:

"The main question and that which goes to the root of the matter is whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the act. In accordance with its terms whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation he is to give notice to the parties owning or controlling the same, after first giving them reasonable opportunity to be heard, to make such alterations as he may specify and upon their failure or refusal to make the same within a reasonable time they are to be deemed guilty of a misdemeanor and the Secretary may direct the institution of criminal proceedings. The power of the Secretary depends upon his having adjudged that the bridge is an obstruction and his adjudication is made final and conclusive. This is a judicial power. The question is one of fact or a mixed question of law and fact and it cannot be determined by a court without a jury unless the defendant consents.

It was held in *Grant vs. Raymond*, 6 Pet., 242, Chief Justice Marshall announcing the decision, that the Secretary of State of the United States is not an officer in whom, under the constitution, judicial power can be vested. In that case the Secretary had gone through with the form of reissuing a patent for an invention. It is true that there was not then any Statute authorizing a re-issue. The original patent had been granted by the President, signed by him and countersigned by the Secretary. It was returned to the Patent Office and canceled owing to the defective specification on which it was issued and another patent issued with a corrected specification. The argument in favor of the re-issue was that the Department of State had clearly the right to correct an inadvertent or innocent mistake but the Court said that the question of inadvertence under the statute was a judicial one which could not be decided by the Secretary of State. It is also true that in a few months after the decision of that case Congress enacted a statute making it lawful for the Secretary of State upon the surrender of a patent invalid or inoperative by reason of inadvertence, accident or mistake, to cause a new patent for the same invention to be issued. But there is this radical difference between the case of a re-issued patent and the case now before the Court.

The patent originally re-issued is only prima facie evidence of an exclusive right in the patentee and it is open to all defenses included in the case of a re-issued patent thus involving an investigation into the question whether there was in fact any such inadvertence, accident or mistake, etc."

And then further says:

"But the question to be here decided is whether Congress could delegate as it has undertaken to do, its authority in the premises to the Secretary of War. The reason for this conclusion is so well and so fully set forth by Judge Shiras in the *United States vs. Keokuk & Hannibal Bridge Co.*, cited above, that it is sufficient to refer to that case and to express as I do my concurrence in the reasoning and conclusions of the opinion therein."

This case it will be seen, exhibits the construction of a statute which was even more liberal than the one we are discussing because that statute provided for a hearing before the Secretary of War and still it was held to be unconstitutional as delegating to him the right to constitute himself as a court to final resort, but in our case Congress has not even allowed the citizen the right to be heard upon the face of the statutes, but has simply said in effect that the Postmaster General may satisfy himself any way he wants to. He may acquire this information from a delegation of competitors in the same business as the other party. A large business institution whose business has been interefered with by other parties going into business might go to the Postmaster General or write him letters giving their side of the case or cause parties of prominence to call upon the Postmaster General to urge him to close up some party's business upon a mere ex parte and cursory hearing. Or the Postmaster General may close them up without any hearing, may cut off their right to receive mail forever, of his own desire and volition if so disposed. And the remarkable thing about these statutes is that there seems to be no time limit in which a party may ever purge himself, if he has done a wrong unless the Postmaster General sees fit to do so. A party might incur the enmity of a

Postmaster General by sending a single letter which in his judgment would be regarded as a fraud upon the mails and he might forever order that his letters be branded fraudulent and the right of the citizen perpetually curtailed.

If these statutes are to be held constitutional then the Postmaster General of the United States has in his power the facility to interfere with the dispatch of business in the Supreme Court of the United States, and if he saw fit upon evidence *satisfactory to himself* he could order that all communications to the Clerk of the Supreme Court of the United States should be stopped, marked fraudulent, and returned to the parties who sent them.

Of course, we do not expect to see this unhappy condition, but if the Postmaster General has the authority to do what he did in the case at bar and there is no inquiry into his right or power and no appeal or remedy and no opportunity for a judicial hearing where the forms of law may be brought into requisition, then he could do anything in the way of destroying and cutting down the mailing right of any citizen, institution or court. And it is in this light that we are to examine into these statutes. If these statutes are to be held valid, the Postmaster General may say that any party or person in the country is conducting a lottery, a gift enterprise for obtaining money through the mails by fraud or false pretenses and having satisfied himself of that may condemn the parties without trial and execute them without making a record upon which he could justify his acts. A party might innocently send a letter through the mail which might tend to deceive other parties and for doing so in spite of the innocent and harmless intent he could be arbitrarily condemned and excluded from the mail right of the country for his lifetime or as long as the Postmaster General remained in office.

In addition to this it will be seen that under these statutes the Postmaster General by his order absolutely prohibits the parties from receiving any kind of mail whether honest or dishonest, fraudulent or righteous. A party can not even receive

social letters from his friends or his relatives except at the grace of the Postoffice official.

The Postmaster General in this case directs all mail to these parties to be branded fraudulent and returned without regard to what it is, that it has appeared to him that these parties are engaged in violating the law. He forbids that the parties shall even have any money that may belong to them in the Postoffice without regard to whether the money is coming to them honestly or dishonestly or as to whether it is procured by any fraudulent means or not. He steps in and undertakes to cancel contracts that the parties may have made with other parties by ordering the money returned to the senders and orders the Postmaster to return all letters and all mail matter that comes to the office at Nevada directed to the complainants to the postmasters where the mail was originally sent. Not only this, but he tells the Postmaster at Nevada that if he cannot find out who the letters are sent from to brand them fraudulent and send them in to the dead letter office. It occurs to us that this unlimited power in the Postmaster General or any other party if tolerated and held to be the right of any ministerial officer, is wholly in conflict with the right to be secure in person and property and free from unwarranted seizure, Congress while passing this statute, if it has the power to enforce it as it stands, might also have provided that the Postmaster General should have the right to visit penalties upon the parties upon evidence satisfactory to him, if they even had the temerity to ask for their mail. Can it be possible that this authority can be delegated to the arbitrary disposition of any officer or person? We must conclude that these sections and this procedure violates the constitution for the reason in that it is the delegation of judicial power to the Postmaster General.

II.

We make the point that these statutes and the proceedings authorized thereunder are void for the reason that they are in conflict with Section 8 of Article 1 of the Constitution of the United States. That constitutional provision vests in Congress the right to establish post-offices and post-roads and to make all laws that shall be necessary and proper for carrying into execution the foregoing power and all other powers vested by the Constitution in the Government of the United States or in any department or office thereof.

It will be seen by this section of the constitution that the power to make necessary and proper laws for carrying into effect all provisions in reference to postoffices and post roads is vested in Congress. Not only this, but there is by this section of the constitution vested in Congress the right of making all necessary and proper laws for carrying on the business of any of the departments having charge of postoffices and post roads. Let us here at this point state that we admit that Congress has the right to make all needful legislation for the carrying of the mail and to make reasonable legislation as to the conditions upon which they shall be carried and reasonable legislation as to the character of mail that may pass through the offices and to say that the mail facilities of the United States shall not be perverted to improper uses or used as a means of defrauding or injuring others. This right we clearly concede and we are making no contention to the contrary in this cause. But what we are contending for is, that Congress must do it and that it cannot delegate the power to any Postmaster General, City or Country Postmaster or any other character of ministerial officer the right to legislate for Congress and the right to tie up without notice and condemn without evidence and interdict the mail right of any citizen without some opportunity of being heard or afforded some manner of examination and trial in some small degree at least harmonizing with the principle that a party has a right to be heard before he is condemned and a right to be heard before he shall be deprived of his property right or his papers

and property seized. We do not deny that there is necessity for legislation of this kind and that the mail facilities of the United States have frequently been improperly used and indeed we think that Congress may wisely provide for prohibiting the use of the mails for fraudulent or improper purposes. And if they desire to do so they certainly have the right to create a statute and enact provisions which shall have that effect. We do not deny that Congress might at any time vest in the Postmaster General the power upon evidence satisfactory to himself to cause an inquiry to be made and if he has reason to believe that the mails are being improperly used by any parties, the authority to file or cause to be filed, a complaint or inquiry before any U. S. District or Circuit Court or Judge thereof in vacation or U. S. Commissioners or any other judicial power, and the parties summarily required to appear to show cause why any such fraud order should not be issued, and as to why they should not be prohibited from using the U. S. mail; and Congress might if they desire, make this judicial body the final arbiter of the question or they might provide that the Postmaster General should be the Judge and set the matter for hearing and provide for the manner of compelling attendance of witnesses and the hearing of testimony before him or before any departmental officer, or any other means that appeals to common reason and fairness, which would give the parties an opportunity to be heard with their witnesses and to present their side of the case before having their property rights destroyed and their business cut down under such circumstances as to give them no remedy whatever.

This, we concede could be done and might properly be, but until Congress has done something of this kind they cannot delegate to any ministerial officer the right to make up his own mind about who should be prohibited from the use of the mails, without hearing, notice or trial and without affording some appeal, remedy or relief.

The authorities we have cited above are equally applicable

to the point we make that these statutes and procedure thereunder violate Section 8 of Article 1 of the United States Constitution.

III.

We make the further point that these statutes and the proceedings authorized thereunder are void and unconstitutional for the reason that they are unreasonable and incapable of enforcement even if constitutional, for the reason that no means is provided by which the Postoffice Department can determine frudulent from honest mail and if constitutional in part could only be enforced by tying up and inhibiting honest mail in order to reach and be effective upon fraudulent or dishonest mail, and for that reason must be held void.

This proposition in our judgment cannot be gainsaid, and looking at these statutes it will be seen that the force and effect of them is to allow the Postmaster General when he desires to do so, to interdict mail of all character and order all letters or mail to be returned or sent to the dead letter office. The absurdity of the situation can be seen from the face of the sections themselves, because they provide that nothing contained in them shall authorize the Postmaster to open any letter addressed to the parties. Now how is it possible under such sweeping provisions as these to do justice to anybody? While the statute appears to authorize the Postmaster General to stop all fraudulent matter and order it returned or branded fraudulent, yet the statute upon its face clearly shows that he could have no way of knowing, because it recognizes the fact that he must not open the mail and therefore they made a sweeping provision which would allow the Postmaster General on any evidence that he might desire to act upon, to make such order that would in effect and must necessarily in effect tie up all the mail of the parties.

Therefore we assert that this statute must be declared void for the reason that it must necessarily in its enforcement give the Postmaster General no means whatever of knowing whether

the mail that he interdicts is or is not fraudulent and affords him no means of inquiry and recognizes that he cannot open them, having afforded no remedy or means of doing it, which can be executed except by necessarily interdicting, branding fraudulent and ordering returned proper mail and mail matter, the statute must be held to be void; and the correctness of this proposition is further enforced by the very order which the Postmaster General issued. It shows upon its face that it does undertake to affect all mail whether honest or dishonest and indeed if the Postmaster General is to act under the statute at all, he could issue no other kind of an order than the one he did issue, that is to say, even if he wanted to prevent the delivery of even one or two matters that he thought violated the law he could not do it without stopping all of the mail that was coming through the office, because he would have no way of knowing unless he should do what Congress should have provided for him to do, have an inquiry before some court or competent tribunal or otherwise conforming to some kind of judicial proceeding so as to ascertain what mail is to be delivered and returned and get some information upon evidence to determine whether or not he should tie it all up. Under this statute even if admitted to be constitutional in part the Postmaster General in its enforcement would be placed in the condition that the blind king was placed who, when trying offenders before him, they getting into a wrangle and the king becoming confused and uncertain as to who was really the guilty party, ordered his executioners to behead everybody in sight.

The proposition is a Hornbook one; that where a statute is unconstitutional in part in order that it may be upheld as to the parts which are constitutional that which is unconstitutional, must be capable of intelligent separation and enforcement so that each may be operative by itself.

120 U. S., 678, *Baldwin vs. Franks.*

Suth. Stat. Constr. Sections 170-171-173.

45 Fed., commencing page 184, *U. S. vs. K. & H. Bridge Co.*

The Supreme Court in the Baldwin case was considering the effect of a provision punishing conspiracies, which provided in general terms for the punishment of all who should conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws and the question arose as to whether that section could be enforced in a territory and not in a State and the Court said:

"It provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. A single provision which makes up the whole section embraces those who conspire against citizens as well as those who conspire against aliens; those who conspire to deprive one of his rights under the laws of a State and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought must be made if at all by construction not by separation. This it has often been said is not enough. Thus in *U. S. vs. Reese*, 92 U. S. 214, the indictment was against two of the inspectors of a municipal election in Kentucky under Sections 3 and 4 of the Act of May 31st, 1870, which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances and for the punishment of those who by unlawful means hindered or delayed any citizen from doing any act required to be done to qualify him to vote or from voting at any election. There was nothing in either of the sections to limit their operation to a refusal or hindrance 'on account of race, color, or previous condition of servitude' of the voter and it was held that they were unconstitutional because on their face they *were broad enough to cover* wrongfully acts without as well as within the constitutional power of Congress."

An attempt was made there as here to limit the statute by construction so as to make it operate only on that which Congress

might rightfully prohibit and punish but to this the Court said:

"For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not."

This same proposition that we are here pressing was very elaborately discused by Judge Shiras in above cited case in the 45 Fed., commencing at page 184 to which we direct attention.

IV.

We make the further point that Section 4 of the Act above cited approved March 2nd, 1895, which reads as follows:

Sec. 4: "That the powers conferred on the Postmaster General by the Statutes of 1890, Chapter 908, Section 2, are hereby extended and made applicable to all letters or other matter sent by mail;" is also in violation of the 4th and 5th amendments, and of Section 8 of Article 1 of the United States Constitution.

It will be seen that this section of the statute authorizes the Postmaster General to interdict all letters or mail whenever he sees fit or upon evidence satisfactory to him without regard to what character of mail matter it is. In other words under these provisions the Postmaster General has been given authority upon evidence satisfactory to himself to stop any person's letter or mail, regardless of its character.

Under this provision of the statute Congress does not even require that the mail should be fraudulent or that any scheme or fraudulent purpose shall be resorted to in order to authorize the Postmaster General to stop it. It simply says that the *same power* that he has to stop any mail relating to any scheme or fraudulent purpose, he shall have under this action to stop all *mail of any character.* They do not even ask him to perform the poor privilege under this section of being even satisfied that the mail facilities are being improperly used. All he has to do under

this section would be to satisfy himself that he wanted to stop the mail. So it can be seen that this provision so far as general letters are concerned cannot be sustained. It certainly will not be contended by the other side that this provision could be constitutional because it will be seen that this section does not say nor confine the Postmaster to stopping letters or mail that contain improper matter but simply authorizes him to exercise the *same power* toward honest mail that he is authorized to exercise by sections 3929 and 4041 as to *improper mail*. This cannot be sustained under any circumstances even if this Court should hold that Sections 3929 and 4041 were constitutional, so far as giving the Postmaster General the right to interfere with and stop *improper mail*. It could not be said that Congress has the right to delegate to him the right to stop mail whenever he wants to that is conceded to be perfectly innocent. This section does not even imply that the letters or other matter sent by mail is to be fraudulent before it can be stopped but it in effect says that as to honest letters the Postmaster General shall have the *same power* as he has under the other section to stop *dishonest matter*. This is the only effect and reading to be given to the section.

We respectfully urge that there is no theory or hypothesis upon which this statute can be held not to violate the constitutional provisions heretofore mentioned and the authorities heretofore cited and we again refer to these citations as applicable under this proposition.

The only authorities that we have been able to find that are relied upon by the opposition as sustaining their claim in this matter, outside of Judge Thayer's decision in the case at bar, is the case found in the 67 Fed. Rep., page 1000, *Enterprise vs. Zumstein*, decided by Judge Lurton of the 6th Circuit Court of Appeals.

That was a case where a lottery was being conducted and the Postmaster General issued one of these fraud orders as in this

case under the provisions of Sections 3929 and 4041 of the revised statutes of the United States. The Enterprise Association applied for injunction. In that case the constitutionality of the statute was not raised nor argued and neither does that Court make any reference whatever to authorities above cited. That case merely decided that Congress had the authority to confer upon the postal department the power to direct the Postmaster to refuse the delivery of registered letters violating the statute upon evidence satisfactory to the head of the department. Now, we do not deny that Congress has the authority to confer that power, but what we contend is that it cannot be conferred in the manner provided by these statutes that is, that he cannot exercise that power without some inquiry and giving the parties a right to be heard, without a trial or some notice and a proceeding before somebody authorized to exercise some kind of judicial power as provided by the law of the land. It will be seen by looking at that case that the Court made no reference to the constitutionality question nor adverted to the fact that other United States Courts had already decided the constitutional question at the time that opinion was rendered, but proceeded upon the proposition throughout the case that the authority existed and that the only question for them to decide was whether the Court could substitute its judgment for that of the Postmaster General after he had decided it. The Court in starting out stated that the question to decide was as to the conclusiveness of the order of the Postmaster General directing the Postmaster at Cincinnati to return all registered letters; while our question presented is not the question as to whether his opinion is conclusive. We grant that his opinion is made conclusive and the very proposition that we are objecting to is the one that the court assumed without discussing in that case, and that is, whether under the constitution he had a right to render any decision under these statutes or to determine the question at all, and that the authority there given was and is void because that

statute attempts to vest power in the Postmaster General to take away the right of the citizen.

We admit it to be a correct proposition that if the Postmaster General be granted the right in the first instance to proceed in this way that this conclusion is final, but the question that we are at war with is as to his constitutional right to do this and that question was not presented in the Zumstein case, but even if it had been, even if the other side contend that it is an authority we must challenge its correctness. We must challenge it as being in conflict with the law of the land and with every principle of justice and with the decisions we have heretofore cited. It would not be in accord with that great principle that underlies our system of government prohibiting the taking away from a party or institution without form of trial, without hearing, without notice, without evidence or opportunity to present it, property and property rights arbitrarily. But such questions must be submitted to a candid determination before some properly constituted tribunal clothed with at least some form of equal opportunity for hearing.

But again it will be seen from the Zumstein case by reading the petition for injunction which was set out in full therein, that no constitutional question was raised; there was no intimation in the petition or claim by the counsel filing it that the law was unconstitutional or that it violated any provision of the constitution of the United States; that the petition was framed purely upon the proposition that they were not running a lottery as the Postmaster General had found in his fraud order and presented a question of fact only and tendered no question that was presented in this controversy.

In our case we have nothing to do with the question that was presented in the Zumstein case as to whether the enterprise carried on by the complainants in this case was such as to violate the sections of the statute or not, but the question in our case is that the statutes are unconstitutional without regard to

the question as to whether our people are violating that statute or not.

His Honor Judge Thayer who rendered the opinion in this case now appealed to this Court, found in 102 Fed. Rep. 565, seems in rendering that opinion to have failed to notice or at least does not call attention in his opinion, to any of the decisions that we have cited in this case, but in adverting to the constitutionality question which we here raise, he disposes of it by stating that the Zumstein case 67 Fed. 100, is decisive of this case.

He says in his opinion that the same propositions in the Zumstein case were presented as are presented in this case. We cannot see how the learned Judge can have possibly come to this conclusion because as we have said in the Zumstein case, no constitutional question was raised in the pleadings, or discussed by counsel, and no such question discussed by the Court as we view the case, and we are at a loss to understand how it could be said that that case settled the question as to the constitutionality of these statutes when nothing whatever was said in that opinion about their constitutionality, and when it was not an issue at all in that case, because the injunction petition upon its face seems to take it for granted that it was constitutional and based the case wholly on the theory that they were not running a lottery and asking the court to revoke the decision of the Postmaster General upon a question of fact. That was the only proposition presented in the case.

His Honor, Judge THAYER, in delivering the opinion on the case at bar further says:

"An attempt is made, however, to distinguish the case at bar from the case last cited (Zumstein case) because of the fact that in the latter case the complainants are alleged to be conducting a lottery while in the case at bar the complainants were charged with using the mail to obtain money by false pretenses."

What we did claim and what we claim now is that the Zumstein case was no authority whatever against the posi-

tion we take in this case and is in no way in conflict with the authorities we have cited, for the reason and because the parties in that case were simply asserting that they were not running a lottery and tending an issue of fact thereon and were not raising any constitutional question, but were simply asking the Court to review the Postmaster General's decision as to whether they were conducting a lottery and that that case was in no way to be likened to the case at bar because in this case the constitutional question is the sole proposition presented.

The learned Judge further said in rendering the opinion in this case on page 568 of the 67 Fed. That the court in the case in the District of Columbia, *Dauphin vs. Key*, 11 D. C., 203, had held that the right "which may at any time be accorded to a citizen by existing laws to use the mails for the transmission of mail matter is a mere privilege created by legislative enactment which may be modified or withdrawn by the same authority that created it and that the privilege in question is not property in the constitutional sense of which anyone may be deprived except in accordance with the judgment of some judicial tribunal or by due process of law."

With this proposition we cannot agree, especially if it is urged as an authority authorizing seizure of mail once received into the mails. It is not in harmony with the decisions heretofore cited in our argument and it cannot be true that this is the law. Why say that the right to use the mails is a mere privilege? We assert that the right to have postal roads and the postoffice system is guaranteed to Congress as one of the powers for it to exercise and when it does exercise the right to establish a mail system as it has in this country for years, the citizen has a property right in that interest and in that right and has the right and the equal right to his money, his check or his draft in the mail as he would have any place else, and the fact that it happens to be enclosed in an envelope and entrusted to the United States mails does not take away his property right. He

owns the interest in that right in the check, the draft, the money order, or the cash, or the interest in the information that is contained in the letter and the commercial right that is in it, and it is as much a property right as any other. If the United States had refused to establish a postoffice system or having established one and then abandoned it, it might be that the courts would hold it was a privilege and a license or a mere voluntary matter on the part of Congress and that they could take it away from the citizens even though it might injure and cripple the business of the entire country, and in this sense it might be said to be a privilege, but how can it be argued as the learned judge concluded that the mail matter of any citizen or the letter which he has been invited by the Government to commit to its care for transmission for a compensation paid, under its system, and when he has placed his draft, his check or his money or his valuables therein, that the Government can confiscate them, take them away, destroy them, send them to the dead letter office, order them returned to somebody else who does not want them returned to them and then say that this is a mere privilege. It is no more a privilege on the part of the Government to take the letter of any individual containing property, money or other information and deprive the party of the right in it, and send it to the dead letter office or convert it, mislay it or hold it up for all time, or order it sent back to some other party, than it is the privilege of a citizen to do the same thing. While it is true that the running and conducting of the mail system may be regarded as a mere privilege extended to the citizen, yet the right of the government to take the citizen's innocent letters and his money and property and convert it after they have once received it is another and entirely different thing.

It might be the privilege of the Government to refuse to send letters in the first place containing valuables or valuable information, it might be their privilege to refuse to establish a mail system in the first instance or to go into the business, but

after they have done so and invited the use of the mails and thrown every safeguard around it at millions of dollars of expense to make it a safe means of transporting mail matter, and a sure means of valuable property delivery, and have procured the property to be committed to its care take it and convert it or refuse to deliver it or order it sent to the dead letter office or order it returned to other parties and then claim that it is a mere privilege, is in our judgment an unjustifiable position.

But let us see what the courts have said as to whether there is a property right in the mail matter or not. And again what has the question as suggested that it is merely a privilege to do with the proposition that the constitution provides that a party's papers and property shall be safe from seizure. What has it to do with the question of whether it is taking actual property without due process of law. We are not and have not been at any stage discussing the question as to whether the government has the privilege of carrying mails or not or as to whether Congress by any proceeding could be compelled to go into the business or not, or as to whether Congress has the right to permit the use of the mails; or whether the right to have mail carried is a privilege. The question here presented is the question whether they have the constitutional right after they have permitted the use of the mails for that purpose to confiscate the property of an individual without due process of law, or without some trial, hearing or inquiry, innocent though it be, because it must be borne in mind in this case that the Postmaster General not only stops the use of the mail to these complainants, but he undertakes to and does take charge of it and seizes the mail and the property right of the complainants in the letters and deprives them of the use of it for all time to come, in our judgment it is idle to talk about the question of whether the right to use the mails is or is not a mere privilege. We are not raising that question. We are confronted by the proposition that these sections authorize the Postmaster General to actually seize and convert the mail whenever he sees

fit to do so, after the government has elected to extend us the privilege.

So we must contend and trust we are justified in contending that his Honor, Judge Thayer has not discussed the question that we have before us here, and even if he had we must still insist that it is not only contrary to all authorities upon the subject but it is clearly against broad principles of reason and in conflict with that general proposition so often stated that a party cannot be deprived of property without due procees of law and that these statutes and the proceedings authorized thereunder are of the most flagrant character when brought in contact with these constitutional provisions.

But if necessary to consult authorities on the question of whether or not the right of a party to receive his mail after it has been admitted to the Department is a property right or a matter in which he has a property interest, we might advert to the case 81 Fed. Page 480, *Hoover vs. McChesney,* where that Court said that the right to the use of the mails was a property right and one which could not be taken away except by due process of law. The Court says:

"We think the right to the use of the mails, though in degree much less valuable than the use of transportation lines would be equally a property right and one which could not be taken away except by due process of law."

Chief Justice FIELD in rendering the opinion in ex parte Jackson, 96 U. S. 727, said in speaking of letters and sealed packages of this character:

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection except as to their outward form and weight as if they were retained by the parties forwarding them in their own domiciles. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable search and seizure *extends to their papers thus enclosed against inspection wherever they may be.* Whilst in the mail they can only be opened and examined under like warrant issued under similar oath or affirmation particularly describing the thing to be seized and no law of Congress can place in the hands of the

officials of the postoffice service any authority to invade the secrecy of letters and such sealed packages in the mail and all legislations *adopted as to mail matter of this kind must be in subordination to the great principle embodied in the 4th amendment to the constitution."*

So it will be seen that the Supreme Court of the United States seems also to be of the opinion that there is a property right of a party in mail committed for transportation guaranteed to him under the 4th amendment.

Again Judge PUTNAM in the 87 Fed. pg. 416-417 adverts to this proposition of Judge FIELD and says:

"It might have thus sought only to purge the mails and what in the judgment of the officers connected with the postoffice department was non-mailable we would then have had the Postmaster General dealing with what was explained by Justice Field in ex parte Jackson 96 U. S., 727-733, to the effect that the United States have no right of search or seizure without proper process and therefore no right to open the mails to ascertain whether or not matter is mailable or non-mailable."

And further he says:

"Congress might have done either of these two things (referring to what Congress might have provided) and if it had done so, we would have had a very different question from what we have with the statute as it now comes to us. The statute neither requires the verdict of a jury nor does it discriminate between what is mailable and non-mailable. It enables the Postmaster General to prohibit the delivery of a letter to the complainant corporation from the Clerk of this Court notifying the corporation that it should appear to answer on its order, or a letter from the counsel of the corporation concerning its affairs and perhaps of vital consequence too. The statute also authorizes the Postmaster General to prevent an honest debtor of the corporation owing an honest debt and desiring honestly to pay his debts from using the mails for that purpose. Some of the provisions of the statute are very far reaching and recognize none of the discriminations which would be recognized if it had been of either class of legislation which I have supposed. As the statute stands it practically enables the Postmaster General to impose upon a person singled out by him according to the statute for a good reason in his own opinion, a penalty beyond the proper subject matter to which the statute relates."

It must be further borne in mind that even if the Zumstein case is to be given any significance as applied to the facts in this case, that the fraud orders in that case were issued in 1894 and at that time, only sections 3929 and 4041 above cited, existed; and that the Act passed March 2nd, 1895, which gave the Postmaster the same power to stop innocent mail as it did fraudulent mail was of course not involved, and it certainly could not be said that the Zumstein case, even if to be held as otherwise of importance would be any justification for the additional proposition that the Act of March 2nd, 1895 giving the Postmaster a right to seize, stop, order returned and interdicted all mail without regard to its character was or is a constitutional provision.

CONCLUSION.

In concluding permit us to again state that we are not contending that the United States Congress may not pass laws prohibiting the improper use of the mails and provide for punishment thereof, nor that they may not by proper legislation provide that the Postmaster General shall be authorized to cause a hearing to be had summarily upon notice before any Court, Judge in vacation, commissioners or any other tribunal that they may fix and that they may not establish any reasonable means for inquiry which conforms to the fundamental idea that a party is entitled to some kind of notice and hearing before he is condemned and for an opportunity to present his case to some authority having authority to hear and determine according to reasonable legal procedure, and that they may establish any such regulations that do not violate the constitutional provisions. Nor are we urging in this argument that the right of Congress to give the citizens a mail system, is or is not a privilege which they may grant or withhold. But we do insist that they cannot delegate to the Postmaster General or any other person the right whenever he sees fit to go out and seize, destroy and interdict

the admitted proper and innocent sealed mail and packages, checks, drafts and money of any person, concern or institution in the United States once committed to the mail without any notice, or hearing, or opportunity to be heard provided by law, and without any remedy or relief on behalf of the party proceeded against either by appeal or other mode and that he cannot any more than any other party upon his own information and upon any reason that he may think satisfactory to himself thus invade the rights of any party.

This is what we are contending for and nothing more, and these are the propositions that we submit to this Court:

1st: That the statutes in question and the proceedings authorized under them are unconstitutional and void as violating the 5th amendment to the Constitution for the reason that it is taking and affecting the property right of the citizen without due process of law.

2nd: That it is in violation of the 4th amendment to the Constitution of the United States inhibiting seizure of papers and property without warrant.

3rd: That it is in violation of the 8th Section of Article 1 of the Constitution, which vests in the Congress of the United States the power to make all regulations in the Department of the Post-office and post-roads and delegates to the Postmaster General the power to become a court unto himself and decide without evidence and execute without trial and that Congress itself must provide if they desire to regulate the subject for some means of doing so and not leave it to the individual feelings and inclinations of any Postmaster General, Postmaster, or any other person to do as he sees fit regardless of the rights of the people.

4th: That the sections and the proceedings thereunder must be held to be void because even if constitutional in part it is impossible to enforce any of its provisions against improper mail without tying up honest mailable matter.

These positions we respectfully urge upon this court as correct and ask that the judgment of the United States Circuit Court for the Western Division of the Western District of Missouri be reversed and the court ordered to issue perpetual

injunction prohibiting the Appellee from proceeding further under the sections aforesaid and in the manner aforesaid and that he be ordered to turn over and deliver to the complainants all mail interdicted and withheld.

Respectfully submitted.

JAMES H. HARKLESS,
Counsel for Appellants.

JOHN O'GRADY,
CHAS. S. CRYSLER,
Of Counsel.

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No. 146. 27

Brf. of Atty. Gen'l (Richards & Howard) for Appellee.

Office Supreme Court U.S.
FILED
JAN 22 1902
JAMES H. McKENNEY,
Clerk.

Filed Jan. 22, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. Kelly, appellants, *v.* I. M. McANULLTY. } No. 146.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. Kelly, appellants,
v.
I. M. McANULLTY
No. 146.

BRIEF FOR APPELLEE.

The appeal in this case is based upon the contention, as stated by appellant, that the action of the Postmaster-General, in issuing the order of May 15, 1900, was unwarranted and void, because the statutes under which authority for these proceedings was asserted are violative of the constitutional provisions embraced in the eighth section of Article I of the Constitution, and also violative of the fourth and fifth amendments to the Constitution.

The refusal of the postmaster to deliver mail to the complainants was in obedience to an order of the Postmaster-General (Tr., p. 11).

(Order No. 475.)

POST-OFFICE DEPARTMENT,
Washington, D. C., May 15, 1900.

It having been made to appear to the Postmaster-General, upon evidence satisfactory to

him, that the American School of Magnetic Healing, S. A. Weltmer, president, J. H. Kelly, secretary, and J. A. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes," approved September 19, 1900:

Now, therefore, by authority vested in him by said act, and by the act of Congress entitled "An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," approved March 2, 1895, the Postmaster-General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word "Fraudulent" plainly written or stamped upon the outside of such

letters or matter; provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the Dead-Letter Office, with the word "Fraudulent" plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

CH. EMORY SMITH,
Postmaster-General.

To the POSTMASTER, *Nevada, Missouri.*

Two of the parties mentioned in this order, The American School of Magnetic Healing, a corporation, and J. H. Kelly, secretary, treasurer and general manager of the corporation, filed this bill against the postmaster to enjoin him from complying with the directions in the order. A demurrer was interposed to the bill, sustained, and, complainants declining to plead further, the bill was dismissed. Appeal was taken from that decree.

I.

THE STATUTES, BY VIRTUE OF WHICH THE POSTMASTER-GENERAL ISSUED GENERAL ORDER NO. 475, ARE NOT REPUGNANT TO THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION.

The clauses of the amendments to the Constitution, claimed by the appellants to have been violated, may be considered together. They are:

> Fourth amendment: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

> Fifth amendment: Nor shall any person be deprived of life, liberty, or property without due process of law.

It will be argued further along in this brief that the questions of constitutional law raised by this bill have been determined in this court. But as it is insisted otherwise, earnestly and with much elaboration of argument and citation, it is advisable to carefully consider whether any guaranteed protection to person and property has been denied or abridged.

The denounced statute is comprehensive. It embraces clauses relating to administrative acts receiving, carrying, and delivering the mails, as well as punitive provisions for offenses committed in those regards. The limitations upon Congress in treating upon these different subjects are also upon different principles. The former come within the enumerated powers of Congress; the latter are restricted by the bill of rights in the amendments.

I will request attention to the statutory provisions:

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which regis-

tered letters arrive directed to any such person or company, or to the agent or representative of such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe.

But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

SEC. 3. That section four thousand and forty-one of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any

lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money order drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

"But this shall not authorize any person to open any letter not addressed to himself."

* * * * *

CHAP. 172. An act to prevent the carrying of obscene literature and articles designed for indecent and immoral use from one State or Territory into another State or Territory.

Be it enacted, etc., That it shall be unlawful for any person to deposit with any express company or other common carrier (1) for carriage from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, or any written or printed card, letter,

circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters or things may be obtained or made; and any person who shall knowingly deposit, or cause to be deposited, with any express company or other common carrier for carriage from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or who shall take from such express company or other common carrier with intent to sell, distribute, or circulate any matter or thing herein forbidden to be deposited for carriage, shall for each offense, upon conviction thereof be fined not more than five thousand dollars or imprisoned at hard labor not more than five years, or both, at the discretion of the court. (February 8, 1897.)

CHAP. 1039. An act amendatory of "An act relating to postal crimes and amendatory of the statutes therein mentioned," approved June eighteenth, eighteen hundred and eighty-eight, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last clause of the second section of "An act relating to postal crimes, and amendatory of the statutes therein mentioned," approved June eighteenth, eighteen hundred and eighty-eight, be, and the same is hereby, so amended as to read as follows, and constitute the third section of said act:

"SEC. 3. That all matter otherwise mailable by law, upon the envelope or outside cover or

wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

SEC. 2. That section thirty-eight hundred and ninety-three of the Revised Statutes, as amended by the act of July twelfth, eighteen hundred and seventy-six, is hereby so amended as to read as follows:

"SEC. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter,

writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for an indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisonment at hard labor not more than five years, or both, at the discretion of the court. And all offenses committed under the section of which this is amendatory prior to the approval of this act may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall

authorize any person to open any letter or sealed matter of the first class not addressed to himself."

Approved, September 26, 1888.

SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-offices at which registered letters arrive directed to any such person to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

SEC. 3894. No letter or circular concerning (*illegal*)—by careful amendment—lotteries, so-called gift-concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send

anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution.

SEC. 3893. [*No obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit or cause to be deposited for mailing or delivery any of the hereinbefore-mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take, or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both.*] (Thus amended.) [Every obscene,

lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court

And all offenses committed under said original section thirty-eight hundred and ninety-three of the Revised Statutes prior to the approval of this act may be prosecuted and punished under the said original section in the same manner and with the same effect as if this act had not been passed.] (See sec. 1785.)

CHAP 393. An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails

Be it enacted, &c., That section fifty-four hundred and eighty of the Revised Statutes be, and the same is hereby, so amended as to read as follows:

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle" or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such

counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post-office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court.

"The indictment, inclination, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or be affected by either opening or

intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment of not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

These legislative provisions, amended and enlarged from time to time, all making for morality and the well-being of the people, are evincive of a determination to prevent the use of the mails for immoral, corrupting, and fraudulent practices. Whatever may or might be stated in the titles of the different acts, as whether for the suppression of lotteries, or the obstruction to the dissemination of obscene books and pictures, or the hinderance to the schemes and devices for obtain-

ing money or property by means of fraudulent pretenses and representations, is of no vital importance. The material thing is that Congress says you shall not use my instrumentalities to do what is settled by universal sentiment to be a wrong. That Congress can say this is indisputable, unless, in the exercise of its power, it infringes some natural or guaranteed right of person or property. It is not necessary—indeed, it would be illogical—to make any distinction in these statutes. They all rest upon the same principles and the same authority. Broadly, it is here asserted, Congress has the power, with the only limitations above stated, to determine what shall be received and carried and delivered in the mails, and what shall be refused from reception, carriage, or delivery.

This being so—and this seems to be conceded in the able argument of counsel for appellants—what constitutional right has been denied to the complainants here? For I do not understand the sweeping assertion to be made that a statute attempting to distinguish mailable from unmailable matter by the character of what is offered for transmission and delivery is unconstitutional. Nor do I understand it is claimed that a statute distinguishing mailable from unmailable matter by the character of the person to whom it is addressed is unconstitutional. The argument, passing by the power of regulation of postal affairs by Congress, is that these statutes authorize searches for and seizure of property arbitrarily and without warrant, and deprive persons of property and property rights without due process of law.

These statutes show a growth in the determination and the means adopted to prevent the use of the mails for immoral, corrupting, and fraudulent practices. They are not infringements of any freedom or privilege of the citizen. Not a strenuous word of Magna Charta or of any subsequent declarations, born from the loins of resistance to despotism, has been lost sight of. The courts have always restricted rather than extended the language in interpretation. Thus in *United States* v. *Smith* (11 Fed. Rep., 663) it is said, speaking of section 3893, that coarse or unbecoming, or even profane language is not within the inhibition. Under section 3894, *United States* v. *Clark* (22 Fed. Rep., 708), a lottery ticket is not a letter within the statute. Ordering a lottery ticket by letter is not within the statute *United States* v. *Mason* (22 Fed. Rep., 707). These were prosecutions by information or indictment, but the principle alike governs in administrative acts.

The expression of this fourth amendment is peculiar, and shows the great prudence of the authors. It is unreasonable searches and seizures which are forbidden.

Justice Story, in his work on the Constitution, comments thus:

> This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong

sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution. Although special warrants upon complaints under oath, stating the crime, and the party by name against whom the accusation is made, are the only legal warrants upon which an arrest can be made according to the law of England, yet a practice had obtained in the secretaries' office ever since the restoration (grounded upon some clauses in the acts for regulating the press) of issuing general warrants to take up, without naming any persons in particular, the authors, printers, and publishers of such obscene or seditious libels as were particularly specified in the warrant. When these acts expired in 1694 the same practice was continued in every reign, and under every administration, except the last four years of Queen Anne's reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming or describing any person in special.

Against these despotic and tyrannical acts Wilkes and other brave spirits fought and suffered imprisonment and persecution: Erskine at the bar and Chatham at the forum alternately argued and thundered. Temple opened wide his liberal purse; Camden from the bench, disregarding what had been said by other eminent judges, handed down the great decision which neither king nor subordinate officer dared to question or disregard.

Over the water, general warrants were dead. But there were English colonies. There were no steam-propelled vessels, no telegraphs, no personal contact and communication between brothers of the same race and blood. Warrants for libel had been hit in the eye and killed. But in the name of collection of revenue the corpse had been miracled and given new life.

How curious it is to note—not only then but now (for from the crack of morn to the present, times and men are the same)—that the radical mistakes of government are related to the raising of revenue. So what commences as good is turned to bad. And municipalities and states and nations go on to extravagance and greed of controlling individuals, and decay and rot. Necessity is the mother of invention, whether the object be right or evil. The greater the need the more reckless the device. And after while thrones topple, heads fall into the basket, empires are deprived of their valuable possessions, and republics are born.

Judge Cooley, in his treatise upon Constitutional Limitations (sixth ed., p. 365), says:

> The history of this controversy should be read in connection with that in America immediately previous to the American Revolution in regard to writs of assistance issued by the courts to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in

an English law book," since they placed "the liberty of every man in the hands of every petty officer." All these matters are now a long way in the past, but it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty.

For the service of criminal process the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works on criminal law, and need not be enumerated here. And there are also cases where search warrants are allowed to be issued, under which an officer may be protected in the like action. But as search warrants are a process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection it is essential that these rules be carefully observed.

The learned author, while condensing the history of search warrants, wanders a little from the logic of the argument by not making the distinction between the acts of one clothed with express authority—that is, carrying an authentic warrant in his hand—and one acting under a general authority, by virtue of his position as a revenue officer. And therefore, while he fairly states *Henderson's Distilled Spirits* (14 Wall., 44), his criticism is hardly sustainable. The Henderson seizure did not

deprive anybody of property except by due process of law.

There can be nothing stronger stated, in determining the rights of the citizen as declared in the fourth and fifth amendments, than is found in the decision and opinion of this court, speaking through Justice Bradley, in *Boyd* v. *United States* (116 U. S., 616).

This was a cause of seizure of 35 cases of plate glass under a revenue act, for the reason of undervaluation. It was thought material and necessary, on the part of the Government, to show the quantity and value of 29 cases of glass previously imported. The importer was required by the district judge to produce the invoice of these goods, which he did under protest. This court decided that was error, because the compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the fourth amendment; and that a statute requiring one to produce his private books and invoices and papers in court, or else the allegations of the Government attorney to be taken as confessed, is unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the fourth and fifth amendments.

What was complained of was not the seizure of the goods awaiting an examination, but the compulsion to make evidence, by the party accused of wrongdoing, against himself. There is nothing in the *Distilled Spirits case* (*supra*) irreconcilable with this.

And all the elaborate reasoning of that case is against the contention of these complainants. It certainly can not be disputed that the rights and privileges and immunities which man is entitled to exercise in securing his property have been asserted and protected in this great judgment. The invocation to the police power was not listened to in this court with patience. There are instances where, in eagerness for reform and municipal regulation of censured affairs, acts are committed by overzealous officers which excite the apprehension of thoughtful men. Houses are violently and forcibly entered, arrests made, and searches and seizures had without warrant and without specific charge and designation of person and thing upon which to found a criminal accusation. These things have been tolerated, not excused. They come, at the best, within the degree of the end justifying the means. The only attempt at justification is that they are for the public good

To show the strictness with which rights of personal property are protected by our judges we can quote what this court said in the case above cited:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be: because it is a material ingredient and effects the sole object and purpose of search and seizure.
>
> The principal question, however, remains to be considered. Is a search and seizure, or,

what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the fourth amendment of the Constitution, or is it a legitimate proceeding? It is contended by the counsel for the Government that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *consuetudo est optimus interpres legum*, and another maxim that *contemproanea expositio est optima et fortissima in lege*. But we do not find any long usage, or any contemporary construction of the Constitution, which would justify any of the acts of Congress now under consideration. As before stated, the act of 1863 was the first act in this country, and, we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the

examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cœlo*. In the one case, the Government is entitled to the possession of the property; in the other it is not. The seizure of goods forfeited for a breach of the revenue laws or concealed to avoid the duties payable on them has been authorized by English statutes for at least two centuries past, and the like seizures have been authorized by our own revenue acts from the commencement of the Government. The first statute passed by Congress to regulate the collection of duties—the act of July 31, 1789 (1 Stat., 29, 43)—contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of

excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. (*Commonwealth* v. *Dana*, 2 Met. (Mass.), 329.) Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits to be applied to the payment of a judgment against him, obnoxious to those amendments.

But when examined with care it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in

> the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

Making the application of these rules to the case presented, what violation of any right has there been by the postmaster at this town or by the execution of the order of the Postmaster-General?

Search involves the idea of something hidden or concealed. That is not here. The carrier must see every letter and packet intrusted to his care. The law inveighed against absolutely forbids any inspection of the contents of the closed missive. No privacy is violated. No exposure is made. No evidence is obtained. The public can not know the correspondence. The prosecuting officer gets no knowledge. There is no seizure at all. There is no forfeiture nor confiscation, not even sequestration.

But the regulation of what may be carried in the mails is another matter. The fallacy of the contention of the complainants is that they should control the matter placed in the mails rather than the Postmaster-General.

II.

The power vested in Congress to establish post-offices and post-roads embraces the regulation of the entire postal system of the country, and Congress may designate what may be carried in the mails and what excluded from them.

In *Ex parte Jackson* (96 U. S., 727), this court, through Justice Field, said:

> The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.
>
> And again:
>
> In excluding various articles from the mail the object of Congress has not been to interfere with the freedom of the press or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals.

In re Rapier (143 U. S., 110), Chief Justice Fuller, in announcing the opinion of the court, said:

> The States, before the Union was formed, could establish post-offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post roads was surrendered to the Congress it was a complete power, and the grant carried with it the right to exercise all

> the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.
>
> The freedom of communication is not abridged within the intent and meaning of the constitutional provisions, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mail, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment through the governmental agencies which it controls. That that power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

It must, reasonably, be within the power of Congress to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of letters or the payment of money orders to a person or corporation which, upon evidence *satisfactory to the head of the department*, is found to be engaged in conducting a lottery or any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises.

This power Congress has exercised and has clothed the Postmaster-General with it.

Section 396 of the Revised Statutes makes it a duty of the Postmaster-General to instruct all persons in the postal service with reference to their duty, and to

superintend generally the business of the Department and execute all laws relative to the postal service.

Section 3834 requires every postmaster before entering upon the duties of his office to give bond for the faithful discharge of all duties imposed on him, either by law or the rules and regulations of the Department. This section subjects the postmaster to the orders of the Postmaster-General.

Section 3926 authorizes the Postmaster-General to establish a uniform system of registration for the greater security of valuable mail matter. It provides that neither the Post-Office Department nor its revenue shall be liable for loss of any mail matter on account of its having been registered.

Section 4027 authorizes the Postmaster-General to establish and maintain, under such rules and regulations as he may deem expedient, a uniform money-order system at all suitable post-offices, which shall be designated as "money-order offices." This authorization, as expressed in the section, is to promote public convenience and to insure greater security in the transfer of money through the mail, and in the same direction of regulation are the provisions heretofore quoted.

The defendant insists that, in the exercise of his discretion, the Postmaster-General can not be supervised or controlled by the courts.

This precise question was passed upon by the circuit court for the southern division of Ohio in *Enterprise Savings Association* v. *Zumstein* (64 Fed. Rep., 837) Zumstein was the postmaster of the city of Cincinnati, Ohio. The Postmaster-General issued a fraud order

as to the mail of the Enterprise Savings Association and certain of its officers. The association, as in the case at bar, applied for an injunction Mr. Justice Sage, in passing upon the question, said (p. 840):

> No citizen has a vested right to the use of either the registered-letter or postal money-order system. Every citizen has the privilege of both, subject to the discretion which is vested in the Postmaster-General. It is the duty of every postmaster to obey the orders of the Postmaster-General made in pursuance of the statutory provisions above quoted, *and in the exercise of his discretion.* The question then is whether this discretion can be supervised or controlled by Federal courts. It is not a new question. It was first considered in the case of *Marbury* v. *Madison* (1 Cranch, 137). In that case, at page 166, the Supreme Court was of opinion that the President is vested with certain political powers to be exercised in his discretion. Whatever opinion might be entertained of the manner in which that discretion was used, there existed and could exist no power to control it. * * *
>
> In the case now before the court the Postmaster-General was authorized to act upon evidence satisfactory to him. What he did under that authorization can not be regarded as a ministerial act. It was in the exercise of a discretion, and it can not be supervised or controlled by this court.
>
> This case was appealed to the circuit court of appeals for the sixth circuit (67 Fed. Rep., 1000) and affirmed.

Mr. Justice Lurton, circuit judge, in delivering the opinion of the court, said:

> The order (fraud order) was one which the defendant (postmaster) was bound to obey unless the Postmaster-General exceeded his authority in making it. From the order it distinctly appeared that in the judgment of the Postmaster-General the Enterprise Savings Association was conducting a lottery or other similar business through the mails in violation of section 3894, Revised Statute, as amended, and that this fact had "been made to appear to the satisfaction of the Postmaster-General." It must follow from the exclusive and absolute power of Congress over the whole subject of what may be carried and what may be excluded from the mails, that it was entirely within the competency to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of registered letters addressed to a person or corporation which was engaged in conducting a lottery enterprise through the use of the register letter department, or to forbid the payment of a postal money order drawn in favor of one engaged in conducting such a business by means of the assistance of that department of the post-office, and that he might make such order upon evidence satisfactory to him (pp. 1004, 1005).

Further on the court says:

> The honorable Postmaster-General, when called upon to pass judgment upon the business of this association, may have been somewhat perplexed as to how to deal with a scheme so

> elaborately arranged as to present upon one view of it a legitimate investment business, but which when looked upon from the other side seemed to show many of the features characteristic of a lottery or other like schemes. The settlement of the question undoubtedly involved the exercise of judgment and discretion, and this very fact operates to take his duty out of the mere ministerial class, and therefore beyond the control or review of the judicial department of Government by means of mandamus or injunction (p. 1006).

The Postmaster-General, by virtue of the statute hereinbefore cited, has ample authority to issue the fraud order under which the respondent performed the acts complained of in the bill herein.

The bill in this case shows that complainants introduced evidence before the Postmaster-General as to the character of the American School of Magnetic Healing, and that this evidence being considered, was deemed satisfactory by him to issue the fraud order. The finding of the Postmaster-General on the issue of fact is an act involving the exercise of judgment and discretion. (*Enterprise Savings Association* v. *Zumstein*, 64 Fed., 840.)

It is the settled law that courts will not interfere to control an executive officer in the discharge of a duty involving the exercise of judgment and discretion.

In *Decatur* v. *Paulding* (14 Pet., 515), the relator, Mrs. Decatur, claimed a pension both under act and a resolution of Congress. The Secretary of the Navy ruled adversely to her. She applied for a writ of man-

damus to pay her according to her contention. The court refused the writ, saying:

> If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by any head of a department; and, if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor reverse his judgment, in any case where the law authorizes him to exercise discretion or judgment; nor can it, by mandamus, act directly upon the officer and guide or control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. * * * The interference of courts with the performance of the ordinary duties of the Executive Department of the Government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.

In *Gaines* v. *Thompson* (7 Wall., 347) the court, in passing upon an application for an injunction to restrain the Secretary of the Interior, through Mr. Justice Miller, said:

> It may, however, be suggested that the relief sought in all those cases was through the writ

of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus. In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands; in the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

Concerning the merits of the case, he said:

The action of the officers of the Land Department, with which we are asked to interfere in this case, is clearly not of this character. The

> validity of plaintiff's entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of Congress. It has been for a long time before the Department, and has received the attention of successive Secretaries of the Interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney-General. It is far from being a ministerial act, under any definition given by this court.

In re Rapier (*supra*) the defendants were arrested for a violation of section 3894, Revised Statutes, as amended by act of September 19, 1890, known as the antilottery act. Mr. Chief Justice Fuller (p. 134) says:

> We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question, nor are we able to see that Congress can be held in its enactment to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the meaning of the constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment and through the governmental agencies which it controls.

The language of the court is particularly applicable to the facts in this case. The defendants are charged with having devised a scheme to defraud, and for using the United States mails in furtherance of said scheme. The Postmaster-General, after a full hearing before him, decided that their scheme was a fraudulent one, and under the powers vested in him issued the fraud order. We are at a loss to see in what particular this violates any right granted to the citizen under either the fourth or fifth amendments to the Constitution of the United States.

In *Enterprise Savings Association* v. *Zumstein* (*supra*) the validity of a fraud order issued by the Postmaster-General to the postmaster at Cincinnati, under the act of September 17, 1890, came under consideration. The court says (p. 1006):

> We see no reason why Congress may not confer upon him (Postmaster General) authority to prevent the use of those facilities by any person engaged in using them for the propagation of a business deemed by it vicious, and not entitled to such special facilities in the extension and conduct of such schemes. The authority to inhibit the use of those postal facilities had to be vested somewhere. It was a matter pertaining to executive business, and was therefore imposed upon the executive head of the Postal Department.

In *Hoover* v. *McChesney* (81 Fed. Rep., 472) a fraud order issued by the Postmaster-General under the act of 1895, extending the powers of that officer "to all

letters or other matters sent by mail," was passed upon. The court says (pp. 478–479):

> It is true the circuit court of appeals of this circuit have affirmed the right of the Postmaster-General to exclude the Enterprise Savings Association and the officers of that association from the use of the money orders and registered letters under the authority of the act of 1890. The Postmaster-General had under said act declared that said association was engaged in conducting a lottery or a similar enterprise for the distribution of money or personal property by lot or chance through the mails in violation of the provisions of section 3894, Revised Statutes, as amended; but as this was a corporation presumably organized and conducted for the purpose of carrying on a business which was declared to be nonmailable matter, it may be fairly said that this was a mere mode of excluding postal matter from the mail which was nonmailable. The order of the Postmaster-General, however, under the then law only applied to money orders and the registered mail. Judge Lurton, in delivering the opinion of the court (67 Fed. Rep., 1000), indicated that there may be a difference between the ordinary mail and the postal service by money orders and registered mail, saying:
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> "Neither of these departments of the postal service are essential to the ordinary use of the mail, and Congress has reposed in the Postmaster-General an unlimited discretion as to when and where he would afford the facilities of this Department. * * *" This decision

> would seem to decide that the order of the 12th of February, 1896, was valid, and authorized the defendant to retain mail matter coming to the Southern Mutual Investment Company and its officers.

The order of February 12, 1896, referred to by the court, referred to all mail, whether registered or not, of the Southern Mutual Investment Company or its officers.

At the October term, 1893, the Pettis County Investment Company filed a bill in equity against H. C. Demuth, the postmaster at Sedalia, seeking an injunction to restrain him from returning letters in compliance with a fraud order issued by the Postmaster-General on August 10, 1893 On the bill and answer his honor, Judge Philips, held that the court had no jurisdiction to review, set aside, or disregard the order of the Postmaster-General of the United States pleaded in the answer.

The assertion that power resides nowhere to prevent transportation of such matter in the mails as Congress shall deem injurious to the morals or safety of the citizen is appalling. The treaty-making power has been assumed to be broad enough to exclude such matter from foreign mail; certainly the power to establish post-offices and post-roads should be equally broad as to the interstate mails.

Does the constitutional guaranty of "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," or that "no citizen shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law" override the duty of Congress to purge the mails? These guaranties, in common with all other provisions, are subordinate to the great leading purpose for which the Constitution was ordained, one of which is the promotion of the general welfare and another to form a more perfect union.

JOHN K. RICHARDS,
Solicitor-General.

ROBERT A. HOWARD,
U. S. Special Attorney.

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Supreme Court of the United States.

No. 27.—October Term, 1902.

The American School of Magnetic Healing and J. H. Kelly, Appellants, *vs.* J. M. McAnnulty.	Appeal from the Circuit Court of the United States for the Western District of Missouri.

[November 17, 1902.]

This is an appeal under section 5 of the Circuit Court of Appeals act of 1891, to review directly the decree of the Circuit Court of the United States for the Western District of Missouri, dismissing the bill of complainants (appellants) on the merits. The bill, as amended by leave of the court, averred in substance that the complainants are, the one a business corporation incorporated under the laws of and doing business in the State of Missouri, and the other a resident and citizen of the State of Missouri; that the defendant was at the time of the filing of the bill and at the times therein stated postmaster in charge of the United States post office in the city of Nevada, State of Missouri, and a resident and a citizen of that State; that as such postmaster he has the exclusive management of the post office in the city of Nevada, and of the receipt and distribution of mail received at that city through the United States mails.

It was further averred that The American School of Magnetic Healing is located and has its chief office and place of business at the city of Nevada, and the complainant Kelly was at the time of the filing of the bill and at all the dates and times mentioned therein secretary, treasurer and general manager of the corporation. In November, 1897, he located at Nevada and engaged in the business of healing diseases and ailments of the human family and the business of teaching the science of healing of human ills, and that in April, 1898, he procured the incorporation of the business under the laws of the State of Missouri, under the name of The American School of Magnetic Healing, and among the stockholders of the company the complainant Kelly was one; that large buildings were erected for such business and large amounts expended in advertising the same. The bill further averred as follows:

"That in and about their business they carried on and conducted, not only the treating of people afflicted with ills at their establishment at said city, but also engaged in the business of teaching and educating others in the practical science of healing, and that a large amount of their business consists of treatment by letter and advice to people throughout the United States and foreign countries, and in the treatment under said circum-

stances they have built up a large and extensive business in the way of receipts of such treatment received through the United States mail, by letter, registered package and otherwise, in the nature of checks, drafts and United States moneys; that said business has grown to such an extent that, immediately and for a long time prior, to the grievances hereinafter complained of the receipts through the United States mails, in the manner aforesaid, for the treatment of persons throughout the United States and foreign countries, have reached and averaged about from one thousand dollars to sixteen hundred dollars per day.

"And your orators state that said business is a legal and legitimate business, conducted according to business and legal methods, and is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof.

"And that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and complainants discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and complainants are confined to practical scientific treatment emanating from the source aforesaid.

"That for a long time previous, and prior to, the grievances hereinafter mentioned, said corporation has been sending out a large amount of advertising matter through the United States post office at said city of Nevada, and that all of its receipts, by checks, drafts or money orders aforesaid, have been received by and delivered to them through the United States post office at the city of Nevada, of which the respondent herein has exclusive charge as postmaster aforesaid, and had, during the time aforesaid, been receiving a large number of letters addressed to said institution and to its office, regarding its treatment and manner of treatment, and business letters pertaining to, and inquiring into, the manner of treatment.

"That all such mail, letters and communications are generally addressed and directed to the American School of Magnetic Healing at said city, and that in many cases said letters are and may be addressed to said J. H. Kelly, secretary or treasurer or manager, or to J. H. Kelly, individually, or to Prof. J. H. Kelly, or to J. H. Kelly or Prof. J. H. Kelly, secretary, treasurer or manager of the American School of Magnetic Healing.

"That said Kelly is also receiving and for a long time past has been receiving letters addressed to him individually upon social matters from friends and acquaintances and concerning business not pertaining to or connected with the business hereinafter stated.

"That prior to the grievances hereinafter mentioned said institute was receiving in the way of letters addressed to it or to its officers in the manner aforesaid an average of about the sum of 3,000 letters per day, and ever since the happening of the grievances hereinafter mentioned there have been accumulating in said post office letters belonging to your orator, addressed in the manner before stated, probably to the total number of 25,000 letters.

"That all of said letters, as your orators are informed and believe, are duly stamped and ready for delivery to them but for the action of the postmaster and postal department hereinafter mentioned."

It was then averred that persons who were prompted by assumed competitive interference with their business complained to the United States Post Office Department at Washington that complainants were not engaged in legitimate business, and therefore, on May 15, 1890, the Post Office Department made the following order:

"POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *May* 15, 1900.

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, president; J. H. Kelly, secretary, and J. A. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes approved September 19, 1900.'

"Now, therefore, by authority vested in him by said act and by the act of Congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States, approved March 2, 1895,' the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'fraudulent' plainly written or stamped upon the outside of such letters or matter. Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the dead letter office, with the word 'fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

CH. EMORY SMITH,
Postmaster General.

To the Postmaster, Nevada, Missouri."

Since such order the defendant has refused to deliver any mail whatever to the complainants, and there had when the bill was filed, as complainants aver on information and belief, accumulated at the post office at Nevada letters addressed to them containing checks, drafts, money orders or money to an aggregate of at least $10,000 in value; that these checks, drafts, &c., came from various customers and clients throughout the United States and foreign countries, who had all been treated and for whom the complainants had performed services under contracts with such parties, and that the sums were so sent in the respective letters in payment for services performed and rendered to the senders respectively, all of the senders being willing and at all times have been willing that their letters

containing the remittances should be turned over to the complainants, they making no objection or complaint thereto.

The complainants further averred that they had been informed by the defendant that on Monday, the 28th day of May, then coming, he intended to stamp on each and every one of the letters addressed to the complainants, under any of the designations theretofore mentioned in the bill, the word "fraudulent" across the face of each letter, without opening it and without knowing what such letter contained or the nature or character of the contents, and that the defendant would then return the letter to the sender thereof in all cases where from the outside of the letter or envelope he was able to determine from whom the same was received, and as to all other letters addressed to the complainants, where he was unable to determine from the outside from whom the letters were sent, the defendant would stamp with the word "fradulent" and send to the dead letter office of the United States Post Office Department all such letters, and the defendant stated that he would refuse to deliver any further mail or letters to the complainants or either of them that might be received at his said post office addressed to them or either of them.

Complainants then averred that if the respondent were permitted to do these things and to return the letters, and refused in the future to deliver or allow complainants to receive any letters or mail matter at the post office at Nevada, it would work irreparable injury, loss and damage to the complainants, and would result in eventually embarrassing, crippling, breaking up and destroying complainants' legitimate business, and that the complainants had no other legal or adequate remedy by which they could prevent the committing of the acts and grievances complained of than by writ of injunction.

The bill then averred that the action of the defendant was based upon the order of the Postmaster General, above set forth, who assumed to act under sections 3929 and 4041 of the Revised Statutes of the United States, and section 4 of an act approved March 2, 1895. (28 Stat. 963, 964.)

Section 3929 of the Revised Statutes is set forth in the margin.*

*SEC. 3929. The Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift-enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post offices at which registered letters arrive directed to any such person, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word "fraudulent" plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

Section 4041 is of the same purport as section 3929, excepting that instead of providing for the retention of registered letters, it forbids the payment by any postmaster to the person or company described of any postal money orders drawn to his or its order or to his or its favor or to any agent of any such person or company, and it provides for the return to the remitters of the sums of money named in those money orders. Section 4 of the act (chap. 191, Laws of 1895; 28 Stat. *supra*) amended section 3929 of the Revised Statutes so as to provide for the retention of all letters instead of merely registered letters as in the original section.

Before the issuing of the written order by the Postmaster General prohibiting the delivery of mail matter to the complainants and pursuant to notice from the Postmaster General, the complainants went before that official at Washington and had a hearing before him, and gave their reasons why what is termed a "fraud order" should not be issued, and that the Postmaster General, after hearing evidence such as in his judgment was contemplated by the sections of the statutes above mentioned, issued the order above referred to, and thereupon the defendant has refused to permit the delivery of the mail, and assigns as his only reason for so doing that it would be in violation of the order of the Postmaster General founded upon the provisions of the statute already set forth.

The bill then averred that the statutes have no application whatever to the conduct or carrying on of complainants' business, which is a legitimate one, and that no fraud, deceit, deception or misrepresentation of any kind has ever been practised by them, and that their customers or clients do not claim or assert that the complainants have in any manner practised any fraud, deceit or misrepresentation at any time in procuring the business from them or in curing their ills or diseases. Complainants further averred that the provisions of the statutes above mentioned are in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, in that they undertake to deprive persons of their property and property rights without due process of law, and if the statutes were enforced they would place in the power of the postmaster and the Post Office Department of the United States the sole and exclusive right to pass upon the rights of the complainants, as between themselves and other parties with whom they deal and transact business through the mails, without a hearing, and that the provisions of the statute are void for the reason that they provide for no tribunal, court or authority to hear or determine any violation of the statute or claimed violation of the statutes, but placed the same absolutely in the power and control of the postmasters and the Post Office Department, and that the statutes vest an arbitrary discretion in the postmasters and the Post Office Department or the Postmaster General to determine as he may see fit, whether right or wrong, the question as to who shall or who shall not have and receive mail from the United States Post

Office Department, and who shall and who shall not use the United States mails, and vests in the department or the Postmaster General, if enforced, the power to interdict and absolutely prohibit the carrying on of all commercial and business transactions of the country done through the mailing system, if they see fit so to do, and make the postmasters and the Post Office Department the sole judges in their own case.

The complainants then asked for an injunction to restrain the postmaster from carrying out the order of the Postmaster General, and that a decree might be entered perpetually enjoining the defendant as prayed for.

The defendant demurred to the complainants' amended bill, (1) on the ground that the complainants had not stated any such case as entitled them to any relief; (2) because the complainants had not stated any ground for equitable relief against the defendant, and had not shown any reason why an injunction should be granted.

The court sustained the demurrer, and the complainants declining to plead further, it was decreed by the court that the amended bill of the complainants was insufficient in law and equity, and it was thereupon dismissed at complainants' cost.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The bill of the complainants as amended raises some grave questions of constitutional law which, in the view the court takes of the case, it is unnecessary to decide. We may assume, without deciding or expressing any opinion thereon, the constitutionality in all particulars of the statutes above referred to, and therefore the questions arising in the case will be limited, (1) to the inquiry as to whether the action of the Postmaster General under the circumstances set forth in the complainants' bill is justified by the statutes; and (2) if not, whether the complainants have any remedy in the courts.

First. As the case arises on demurrer, all material facts averred in the bill are of course admitted. It is, therefore, admitted that the business of the complainants is founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment emanating from the source aforesaid."

These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants who are conducting the business upon the basis stated thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations or promises. Can such a business be properly pronounced a fraud within the statutes of the United States?

There can be no doubt that the influence of the mind upon the physical condition of the body is very powerful, and that a hopeful mental state goes far in many cases, not only to alleviate, but even to aid very largely in the cure of an illness from which the body may suffer. And it is said that nature may itself, frequently if not generally, heal the ills of the body without recourse to medicine, and that it cannot be doubted that in numerous cases nature when left to itself does succeed in curing many bodily ills. How far these claims are borne out by actual experience may be matter of opinion. Just exactly to what extent the mental condition affects the body, no one can accurately and definitely say. One person may believe it of far greater efficacy than another, but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater than even a vast majority of intelligent people might be willing to admit or believe. Even intelligent people may and indeed do differ among themselves as to the extent of this mental effect. Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them towards the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud or a false pretense or promise within the meaning of these statutes? How can any one lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. The bill in this case avers that those who

have business with complainants are satisfied with their method of treatment and are entirely willing that the money they sent should be delivered to the complainants. In other words, they seem to have faith in the efficacy of the complainants' treatment and in their ability to heal as claimed by them. If they fail, the answer might be that all human means of treatment are also liable to fail, and will necessarily fail when the appointed time arrives. There is no claim that the treatment by the complainants will always succeed.

Suppose a person should assert that, by the use of electricity alone, he could treat diseases as efficaciously and successfully as the same have heretofore been treated by "regular" physicians. Would these statutes justify the Postmaster General, upon evidence satisfactory to him, to adjudge such claim to be without foundation and then to pronounce the person so claiming, to be guilty of procuring, by false or fraudulent pretenses, the moneys of people sending him money through the mails, and then to prohibit the delivery of any letters to him? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a Postmaster General, and was it intended that he might decide the claim to be a fraud and enjoin the delivery of letters through the mail addressed to the person practising such treatment of disease? As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.

Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practised it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practised precisely upon the lines set forth by its originator, is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded

against under these statutes and liable at the discretion of the Postmaster General, upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses and their letters stamped as fraudulent and the money contained therein as payment for their professional services sent back to the writers of the letters? And, turning the question around, can physicians of what is called the "old school" be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. And so, it is said, do people recover who are treated under this mental theory. By reason of it? That cannot be averred as matter of fact. Many think they do. Others are of the contrary opinion. Is the Postmaster General to decide the question under these statutes?

Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes.

That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts, which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not as matter of law cover the facts herein.

Second. Conceding, for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. (*Burfenning* v. *Chicago &c. Railway Company*, 163 U. S. 321; *Johnson* v. *Drew*, 171 Id. 93, 99; *Gardner* v. *Bonestell*, 180 Id. 362.)

While the analogy between the above cited cases and the one now before us is not perfect, yet even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers.

Thus in the *Burfenning case* (*supra*) a tract of land had been reserved from homestead and pre-emption, and had been included within the limits of an incorporated town, notwithstanding which the Land Department had decided that the land was open to entry and had granted a patent under the statute relating to homesteads. The court said that "When by act of Congress a tract of land has been reserved from homestead and pre-

emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld.

In our view of these statutes the complainants had the legal right under the general acts of Congress relating to the mails to have their letters delivered at the post office as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money

orders and money itself, all of which were their property as soon as they were deposited in the various post offices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful. In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster General's order being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case, as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject matter (assuming the validity of the acts) and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts.

Without deciding, therefore, or expressing any opinion upon the various constitutional objections set out in the bill of complainants, but simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have the power to grant relief against, we are constrained to reverse the judgment of the Circuit Court, with instructions to overrule the defendant's demurrer to the amended bill, with leave to answer, and to grant a temporary injunction as applied for by complainants, and to take such further proceedings as may be proper and not inconsistent with this opinion. In overruling the demurrer we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants as in fact conducted amounts to a violation of the statutes as herein construed.

Judgment reversed.

Mr. Justice WHITE and Mr. Justice MCKENNA, believing the judgment should be affirmed, dissented from the foregoing opinion.

True copy.

Test:

Clerk Supreme Court, U. S.